IN THE HIGH COURT OF ZAMBIA 2010/HP/955
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	ARTICLE 28(1) OF THE CONSTITUTION OF ZAMBIA CAP 1 OF THE LAWS OF ZAMBIA.
AND IN THE MATTER OF:	RULE 2 OF THE PROTECTION OF FUNDAMENTAL RIGHTS RULES, 1969.
AND IN THE MATTER OF:	ARTICLES 11(b); 19(1) AND 23(2) OF THE CONSTITUTION OF ZAMBIA CAP 1 OF THE LAWS OF ZAMBIA.

BETWEEN: **KELVIN HANGANDU** **PETITIONER**

AND

LAW ASSOCIATION OF ZAMBIA **RESPONDENT**

Before the Hon Mr Justice Dr P Matibini, SC, this 31st day of December, 2012.

For the petitioner: In person.
For the respondent: R Simeza, and K Chenda, of MessrsSimeza Sangwa and Associates.

JUDGMENT

Cases referred to:

American cases:

1. *Plessy v Ferguson 163 U.S. 537, 16 S Ct 1138, 41 LEd 256 [1896].*
2. *Dish v Gobitis 310 US 586 [1940].*
3. *Everson v Board of Education 330 U.S. 67 S. Ct 504, 91 LEd 711 [1947].*
4. *Brown v Board of Education 347 U.S. 483 S.Ct 686, 98 LEd [1954].*
5. *Braunfeld v Brown 366 U.S. 599, 81 S.Ct 1144, 6 LEd 2d 563 [1961].*
6. *Sherbert v Verner 374 U.S. 398, 83 S.Ct 1790, 10 LEd 965 [1963].*
7. *Furman v Georgia 408 U.S. 238, 33 LEd 2d 346, 92, S.Ct 272 [1972].*

English cases:

1. *Queen v Big M Drug Mart Limited (Others Intervening) [1986] L.R.C. (Const) 332.*
2. *Ramlogan v The Mayor of San Fernando [1986] L.R.C. 377.*
3. *Minister of Home Affairs and Another v Jamaluddin Bin Othman [1990] L.R.C. (Const) 380.*
4. *R v Secretary of State for Education and Employment and Others ex parte Williamson and Others [2005] UK HL 15.*

South African case:

1. *Christian Education South Africa v Minister of Education [2000] 9 BHRC 53.*

Zambian cases:

1. *Kachasu v Attorney General (1967) Z.R. 145.*
2. *Nkumbula v Attorney General (1972) Z.R. 204*
3. *Wina and Others v The Attorney General (1990-1992) Z.R. 95.*
4. *Nawakwi v The Attorney General (1990-1992) Z.R. 112.*
5. *The People v Mwape and Mmembe HPR/36/94 (unreported).*
6. *Phiri v Bank of Zambia (2007) Z.R. 186.*
7. *Mahtani and Others v Attorney General and Others 2010/HP/872. (to be reported in Volume 3, of 2010 Zambia Law Reports).*

Legislation referred to:

1. *Constitution of Zambia, Cap 1, Articles 11(a) and (b); 18(2)(e); 19(2); 23(2), and 28(1).*
2. *Protection of Fundamental Rights Rules; Statutory Instrument Number 156 of 1969; Rule 2.*
3. *Law Association of Zambia Act cap. 31 s.4(1) and Rule 17.*

Works referred to:

1. *Lee Epstein and Thomas G. Walker; Constitutional Law For a Changing America: Rights Liberties and Justice (Washington DC, CQ Press, 2010).*
2. *International Covenant on Civil and Political Rights 1966, Articles 18 and 27.*

3. *Longman Dictionary of Contemporary English New Edition for Advanced Learners (Essex, Pearson Education Limited, 2009).*
4. *Macmillan English Dictionary for Advanced Learners, Second Edition (Oxford, Macmillan Publishers Limited, 2007).*
5. *Oxford Paperback Thesaurus, Third Edition, (Oxford, Oxford University Press, 2006).*

This matter was commenced on 7th September, 2010, by way of a petition pursuant to Rule 2 of the Protection of Fundamental Rights Rules; Statutory Instrument Number 156 of 1969. In the petition, the petitioner averred as follows: the petitioner is an advocate of the High Court of Zambia, and a member of the Law Association of Zambia; the respondent in this matter. The respondent is constituted by an Act of Parliament to advance the professional interests of advocates in Zambia. Thus, among the respondent's statutory objects are in terms of section 4(1) of the Law Association of Zambia Act, the advancement of the rule of law and the rights and liberties of individuals.

The petitioner contends that contrary to the preceding objects, the respondent has willfully set out and operated its affairs in a well-crafted discriminatory manner that has excluded the petitioner from participating in the professional affairs of the respondent by virtue of the fact that the petitioner is a member of the Seventh Day Adventist Church (SDA). Among the fundamental doctrinal beliefs of the SDA,, is the immutable biblical command enshrined in the fourth commandments in the Old Testament of the Holy Bible in the Book of Exodus, chapter 20, verses 8 – 11, that the seventh day of the week is the Sabbath of the Lord God, and must be sacredly observed between Friday sunset, and Saturday sunset, through public worship and complete abstention from any form of menial work and regular activity, such as participation in the regular and periodic business meetings customarily conducted by the respondent on Saturdays, on the occasion of any of its formal meetings, including but not limited to the respondent's Annual General Meeting (AGM).

The petitioner further contends that by long standing custom and usage, the respondent has routinely held its AGM on a Saturday to conduct its elections. The respondent's meetings have continued despite the petitioner's formal written complaints that his fundamental rights to religious liberty and freedom faith based segregation should be upheld by the respondent's alteration of the days of convening meetings, so that they are not held on the holy Sabbath. The petitioner, therefore, prays that:

(a) it may be determined and declared that his fundamental rights to freedom of conscience, and not to be discriminated against have been contravened, contrary to Articles 11(a), 19(1), and 23(2) of the Constitution of Zambia;
(b) it may be determined and ordered that the respondent whether by itself, its agents, or servants or otherwise howsoever be restrained and an injunction be granted restraining it from holding or transacting any of its formal meetings during the Sabbath i.e. from Friday sunset, to Saturday sunset;
(c) the Court may make such order, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights provisions allegedly violated in relation to the petitioner pursuant to Article 28(1) of the Constitution of Zambia; and
(d) thepetitioner may have the cost of this action, and any such further relief or other reliefs, as may be just.

On 28th October, 2011, the respondent filed its answer to the petition. In the answer, the respondent admitted that it is constituted by an Act of Parliament to promote the interests of legal practitioners in Zambia. And to advance the rule of law, rights, and liberties of individuals. The respondent however, denies that it has conducted its affairs in a discriminatory manner that has resulted in excluding the petitioner from participating in the affairs of the respondent on the ground that he is a member of the SDA.

The respondent contends that the practice of holding its AGM, and other meetings on Saturdays has been in place from time immemorial, and even before the petitioner's professed conversion to SDA. Thus the respondent denies that the petitioner's fundamental right to religious liberty and freedom from faith based segregation, if such a freedom exists, has been infringed upon considering that the holding of the meetings on Saturday has nothing to do with any member's religious beliefs, but is due to the convenience of the day for the majority of the members who attend such meetings. In any event, the respondent contends that the petitioner can nonetheless participate in the voting activities of the respondent by sending a proxy under rule 17 of the respondent's Electoral Rules.

Consequently, the respondent denies that it has contravened Article 11(a) of the Constitution of Zambia, because the petitioner has continued to enjoy his freedoms of life, liberty, to security of the person and protection of the law. Further, the respondent contends that the petitioner has not been coerced or suspended from participating in his preferred religious activities held on Saturdays. As a result, the respondent denies that it has contravened Article 19(1) of the Constitution because the petitioner has since his conversion continued to enjoy his freedom of conscience and religion, by attending his church services on the day in question, despite the regular nature of the respondent's AGM. Thus the respondent contends that the holding of its meetings on Saturdays has no nexus to the exercise of any religious activity. The respondent also denies that it has contravened the provisions of Article 23(2) of the Constitution on the basis of faith based discrimination, because the holding of the meetings is based on the consent of the majority of the members of the respondent. The respondent, therefore, urged me to dismiss the petition, and condemn the petitioner in costs.

The petitioner called one witness by the name of PatsonTembo. I will continue to refer to him as PW I. PW Iis a member of the SDA, and congregates at Lusaka Central Church. PW I testified as

follows:SDAmembers maintain the Sabbath as a day of worship which commences at sunset on Fridays, and ends at sunset on Saturdays. The origin of the Sabbath is in chapter 2, verses 1 to 3 of the book of Genesis. This gist of the verses is that after the Lord God created everything he had to create in six days, he declared the seventh day a Sabbath. SDA members are, therefore, expected to perform all their activities in six days. And the seventh day,is the day of convocation or holy worship. And a member of the SDA is expected to be at the place of worship on the Sabbath day. Sabbath is a day of rest, worship, and ministry in harmony with the teaching and practice of Jesus the Lord of Sabbath.Any member who does not observe Sabbath, is regarded as having denied the faith, and as such would not be regarded as a member of SDA. The member's name would be removed from the register of the church. Although such a member may attend church, he is not eligible to participate in leadership activities.SDA takes a strong view of any of its members who sends a proxy or representative to do regular work on behalf of such member, while such member is worshipping. The Sabbath is expected to be kept holy. The SDA cannot accommodate a member who desires to attend to regular activities on Sabbath.

The petitioner also testified. He testified as follows: he is a member of the respondent. He has been a member since 15th November, 1996. He was baptised as a member of the SDA on 24th May, 2003. Since his baptism, he has encountered difficulties in participating in the AGM of the respondent, because time immemorial the respondent has conducted its meetings on Saturdays. Yet, the AGM of the respondent is a very special and solemn occasion when its leadership is elected, and its various standing committees constituted. During the AGM, the budget of the respondent which runs in excess of one billion Kwacha is tabled before, and considered by the general membership of the respondent.

It has become utterly impossible for the petitioner as a *bonafide* member of the respondent to participate in the solemn and exceedingly serious meetings and programmes of the respondent because he is a member of

SDA. As a member of SDA, the petitioner is required to be faithful, and abstain from attending the meetings and programmes of the respondent. The SDA does not even permit it members to send a representative, or proxy to the meetings and programmes of the respondent. The sad net effect of all this, is that since 2003, it has been impossible for the petitioner to participate fully as *bonafide* member of the respondent. And also to vie for any position in this illustrious body or society of lawyers.

The petitioner has not sat as a grieving member. He has written to the respondent on two occasions explaining, and complaining that since he became a member of SDA, he has been unable to attend the AGM or to vie for office.The first time he petitioned the respondent, was sometime in 2005, and he received a negative response. From that time, he broodedover the matter, and pondered what course of action to take,in light of the refusal by the respondent to accommodate him.

Four years later, in 2009, the petitioner renewed his request hoping that with the change of leadership, they would also be a change of heart. The petitioner was however, informed by the new leadership that his request had been considered in a vote, and rejected, preferring to maintain the *status quo* of convening the AGM on Saturdays.When the petitioner was told that the second petition had been rejected in the same way of the first petition, he considered that he had exhausted his options at a negotiated settlement with the respondent, and decided to sue the respondent. The decision to sue the respondent was not taken lightly, because the petitioner did not want to fight his brethren in a Court oflaw. However, he pursued this course of action because the respondent proved to be stubborn, and intransigent over his plea.

Thus the petitioner has come running to this Court, and brought thispetition believing that his fundamental civil liberties have been and continue to be violated by the respondent. And he feels that the respondent has acted very unfairly in the manner it has handled his

grievance by insisting that the AGM should continue to be held on Saturdays, simply because that has been the practice time immemorial.
The petitioner maintained that the decision to convene the AGM on Saturdays is not cast in stone. It is not a law which cannot be changed. It is simply a practice born out of convenience. In any event, some of the standing committees of the respondent convene on days other than Saturdays. The petitioner cited the example of the Legal Practitioners Committee which convenes on Fridays from about 0900 hours. Another example is the conduct of seminars on other days other than Saturdays. There is, therefore, precedent that the respondent conducts its business on other days other than Saturdays. Besides, the petitioner observed that whenever the respondent convenes its AGM, the Chief Justice authorises the re-scheduling of cases to enable not only lawyers, but also judges as former members of the respondent to take time off, to attend the respondent's meetings. The petitioner maintained however, that unlike the respondent, SDA cannot shift the timing of the Sabbath.

At the close of the petitioner's testimony, MrSimeza, indicated to me that the respondent would not call any witness because the facts relating to the matter are not in dispute, and that the resolution of the dispute largely turns on the interpretation of the law. Thus, the hearing came to a close.

On 8th September, 2011, MrHangandu filed his written submissions. After setting out the factual matrix, he put forward two grounds of arguments. Under the first ground, he argued that the respondent has and willfully continues to contravene the petitioner's fundamental right to freedom of conscience as enshrined in Article 19(1) of the Constitution, in that by a long standing tradition, the respondent convenes its AGM and several of its official programmes on Saturdays, during daytime and until sunset, notwithstanding the petitioner's formal complaint as a *bonafide* member of the respondent.MrHangandu maintains that the timing of such meetings and programmes unfairly hinders him from participating in the affairs or activities of the respondent because the holy Sabbath of which

he devoutly observes as a constituent part of his religious creed as a baptised Seventh Adventist, falls during the same period.

MrHangandu alsoargued that freedom of conscience is a human right, which when violated warrants judicial relief. This principle, he continued, has been universally acclaimed since at least the Dark Ages.MrHangandu drew my attention to Articles 18 and 27 of the International Covenant on Civil and Political Rights 1966, which enshrines freedom of conscience and religion as a fundamental right. He submitted that in their international relations, nations formally acknowledge that religious liberty transcends the scope of mere international comity. In this regard, he submitted that no State has any legal authority to dissipate in whatever manner, the freedom of conscience, and much less subordinate governmental organs, or even statutory bodies whose power is intrinsically founded on the authority of Acts of Parliament.MrHangandu submitted that freedom of conscience or religious liberty has been said to compromise:"*the right to have or adopt the religion of one's choice; to change religious belief according to conscience; to manifest one's religion individually or in community with fellow believers, in worship, observance, practice, witness and teaching, subject to respect for the equivalent rights of others"*(see Seventh Day Adventist Church Manual Revised, 2005,17th Edition)

MrHangandualso drew my attention to the case of *Everson v Board of Education 330 USI 194,* and submitted that where the government and the church however intermeddle in each other's sphere of activity, the principle underpinning freedom of conscience is abridged. The *Everson case* (supra) is also renowned for providing a widely accepted narrative of the historical origins of the First Amendment's Establishment Clause.

MrHangandu noted however, that the respondent's rebuttal to the petition is that it has never compelled him to abscond from the AGM or any programme of the respondent held on the Sabbath. MrHangandu's reply to thiscontention is that the convocation of therespondent's programmes during the Sabbath, has everything to do with him as a devout member of

the SDA, in so far as the timing unfairly hinders him from participating in the respondent's meetings, and programmes by reason only of his faith, and notwithstanding that he has been a *bonafide* member of the respondent since November, 15th 1996, when he was admitted to the Zambian bar.

In advancing this submission, MrHangandudrew inspiration from the decision of the US Supreme Court in*Braunfiedv Brown 366 US 599, 81 s ct, 1144Led, 2d 563 (1961)*, when it observed that:

"If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterisedas being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden"

MrHangandupointed out that another decision in point is that of the US Supreme Court in*Sherbet v Verner 374 US 398, 83 s ct 1790, 10 LEd2 d 965 [1963].* In the *Sherbert* case (supra), a member of the SDA was discharged by her South Carolina employer for refusing to work on Saturday;*"the Sabbath Day of her faith."* She declined to seek alternative employment from businesses that offered her work on the Sabbath, and filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. The Employment Statute Commission, in administrative proceedings under the Statute, disqualified her cause for seeking the benefits as without good cause. She filed a suit. The Commission's finding was upheld by the State Courts. And she appealed to the US Supreme Court for redress. This is what the Supreme Court said:

"Here not only is it apparent that the appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her

Saturday worship. Nor may the South Carolina Court's construction of the statute be saved from constitutional infirmity on the ground that employment compensation benefits are not appellant's "right" but merely a "privilege". It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. Significantly, South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we hold infringes the sabbatarians religious liberty. The unconstitutionality of the disqualification of the sabbatarian if compounded by the religious discrimination which South Carolina's general customary scheme necessarily effects.

In holding as we do, plainly we are not fostering the "establishment" of the Seventh Day Adventist religion in South Carolina, for the extension of unemployment benefits to sabbatarians in common with sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the effect of the Establishment Clause to forestall... Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest..."

MrHangandu submitted that it is a violation of the liberty of conscience, and or the free profession of faith to officially compel religious doctrinal indoctrination on pain of legal sanction. *Sherbet v Verner* (supra),MrHangandu submitted, is authority for the view that freedom of religious conscience may subtly and yet effectually be destroyed where the adherents of one religious faith are confronted to abandon their religious convictions respecting a day of rest, via a measure whose design in effect selectively aims at or even intrinsically disadvantages members of a particular faith alone. This can be through State legislation as was the case in *Sherbet v Verner* (supra), or via the unlawful act of a public body constituted by an Act of Parliament, such as the respondent, MrHangandu argued.

MrHangandu submitted that without defining the right, US Supreme Court judge Hugo Black found occasion in *Everson v Board of Education* (supra), to enumerate factors that are in inimical to religious liberty. MrHangandusubmitted that *Everson v Board of Education* (supra) abominates religious establishment, and every king of preferential

treatment in favour of a particular faith, for their tendency is to impair the principle of religious liberty.In the wake of *Everson v Board of Education* (supra),MrHangandu submitted that the respondent's insistence to hold its AGM, and other of its official programmes during hours deemed to constitute the holy Sabbath for him, and his brethren in SDA cannot be tolerated at all. MrHangandu maintained that the so called immemorial practice of the respondent requiring it to convene the AGM, and most of its programmes on the Sabbath is constitutionally infirm, and unlawful in light of the impeccable authorities cited above. MrHangandu contended that the practice must end now, and should be perpetually interdicted by an injunction. Conversely, he argued, that his fundamental right to profess and observe the Sabbath without any let or hindrance, whether direct or proximate, ought to be upheld as a fundamental liberty that is jealously guaranteed by the Constitution.

MrHangandu also submitted that the SDA's insistence on worshipping on the seventh day Sabbath, during Saturday daytime is enjoined biblically, and is born out of its belief that the Holy Bible; the authority of written Word of God - must never be subjugated to any human-made ordinance at all, as is the practice commonly observed by the Roman Catholic Church, and the multitude of its breakaway sisterhood of Sunday keeping Christian churches. He argued that in matters of religious conscience, each person must freely worship God according to the dictate of his own heart, or conscience. This sacrosanctprinciple,MrHangandu submitted, which the respondent seeks to unlawfully and subtly tear away by pressing him to make the stark choice of either sinning; by attending its AGM, and other Saturday daytime based programmes, or altogether craftily banish him from such programmes and activities by reason only of his loyalty to the Almighty and his total fidelity to the Holy Bible.MrHangandu continued, that the respondent's tradition of convoking meetings during Saturday daytime is seriously inimical to the religious liberty of members of the Jewish and SDA faith who believe that the Sabbath commandment enjoins

regular pursuits on any day, including Sunday, excluding Friday sunset to Saturday sunset.

Under the second ground of the argument,MrHangandu submitted that the respondent wilfully continues to contravene his fundamental freedom from discrimination on account of his religious creed as provided in Article 23(1) of the Constitution, in that by custom, the respondent knowingly convenes its AGM and several of its official programmes on Saturdays, during daytime and sunset notwithstanding his formal complaint as a *bonafide* member of therespondent. MrHangandu maintained that the timing of such meetings and programmesunfairly hinders him from participating in the affairs, or activities of the respondent because the Holy Sabbath of which he devoutly observes as a constituent part of his religious creed as a baptised SDA falls during the same period.

MrHangandu submitted that in the foremost desegration and "equal protection of the law" case in US constitutional law; *Brown v Board of Education* (supra), the US Supreme Court was petitioned to outlaw the so-called "Separate but Equal" education system. According to this now unconstitutional policy of racial segregation, members of the Negro race - black Americans - could not be admitted to the white only schools.MrHangandu pointed out that US State laws had been permitted by a 1896 decision of the US Supreme Court, in *Plessy v Ferguson 163 US 537 16 S Ct 1138, 41 L Ed 256 [1896],* to racially segregate against Negros, and deny them admission to schools attended by white children, provided State law required, or sanctioned that. MrHangandu submitted that it is noteworthy that Mr Justice Horlan(himseff a caucasian) gallantly dissented, and slighted the Courts decision to allow racial discrimination in the United States of America.In this regard, he observed as follows:

"If this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaching of native and naturalised citizens of the United States or of protestants and Catholics?The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it

remains true to its great heritage, and holds fast to the principles of constitutional liberty."

MrHangandu submitted that justiceHorlan in denouncing the Court's judgment as being unjust and unconstitutional made the following observation:

"But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colour blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The law regards man as man, and takes no account of his surroundings or of his colour when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

Sixty million of whites are in no danger from the presence here of eight million blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what can more certainly create and perpetuate a feeling of distrust between these races, than State enactments, which in fact, proceed on the ground that coloured citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all admit, is the real meaning of such legislation as was enacted in Louisiana."

MrHangandu submitted that in *Brown v Board of Education 347 US 483, 74 S.Ct. 686 LEd [1954]*theUS Supreme Court was petitioned to outlaw as unconstitutional the so-called *"separate but equal"* doctrine in the field of public education. The petitioners objected to the doctrine on the ground "that segregated public schools are not "equal" and cannot be made "equal", and that hence they were deprived of the equal protection of the laws.

MrHangandu submitted that writing for the Court, Chief Justice Earl Warren held that the doctrine intrinsically led to inequality in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications by virtue of the racial discrimination. The learned Chief Justice then stated further that:

"In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when Plessy v Ferguson was written. We must consider public education in the light of its full development. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of State and local governments.... Such opportunity, where the State has undertaken to provide, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

Any language in Plessy v Ferguson contrary to this finding is rejected.We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the Plaintiffs and others similarly situated for whom the actions have been brought are by, reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

MrHangandu submitted that the Fourteenth Amendment of the famed US Constitution is the equivalent of Article 23(3) of the Constitution of Zambia which outlaws discrimination on the basis of religious creed. As regards, the Fourteenth Amendment, MrHangandu noted that it tersely provides that:

"Section 1 All persons born or naturalised in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny, to any person within its jurisdictions the equal protection of the laws.

MrHanganduargued that in essence, Article 23(2) of the Constitution of Zambia which is by far much more youthful than its US counterpart in the FourteenthAmendment, enshrines the hallowed constitutional principle of "equal protection of the laws."MrHanganduargued further that, therefore, any official act purposely or even effectively segregates a citizen or any person within the jurisdiction or realm of the Republic of Zambia on the

ground of race, creed, etcran afoul the constitutional principle of equality of treatment.

MrHangandu noted that the respondent argued that it cannot be said to have discriminated against the petitioner within the meaning of Article 23(2) of the Constitution of Zambia because he absconded from the respondent's AGM, and other of its programmes as convoked on Saturday daytime on his own volition. And that having thus absconded, his failure to attend the respondent's meeting; vie for office; or vote during such programmes, is entirely his own making, and not necessarily on account of the fact that he had been segregated by the respondent in any way. This argument, MrHangandu noted runs further, when it is asserted that he if he chose could even participate in the affairs or activities of the respondent by proxy, as provided for in Rule 17 of the respondent's Electoral Rules.

In response, MrHangandu submitted that these arguments are both simplistic and false to a discerning mind. He argued that he does not require to show that the respondent have in place a regulation that bars him from attending its programmes convened during Sabbath, in order to prove his case of discrimination on the ground of religious, creed in this case. And nowhere do the legal authority lay down such an unrealistic threshold or standard of proof. Rather, MrHangandu submitted, it is accepted, in cases alleging unlawful segregation or inequality of treatment, that an act or law that is *exfacie* non-discriminatory,can in fact be discriminatory in its operations or effect. (see*Furman v Georgia 408 US 238, 33 L Ed 2d 346, 92 S.Ct 2726 [1972] per justice Douglas*)

MrHangandu submitted that in*Sherbet v Verner*374 U.S. 398 S.Ct, 790, 102 L.Ed 2d 965 [1963],justice Brennan eruditely articulated the rule of unintentional, or indirect unlawful official action in the following terms:

"We turn first to the question whether the disqualification for benefits impose any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a

disqualification to religious principles and practices may only be an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning not the end, of our inquiry. For if the purpose or effect of law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterisedas being indirect. Braunfeld v Brown. Here not only is it apparent that appellants declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion, and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion, in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."

MrHangandu submitted that the respondent's rebuttal is in essence that in order to succeed under this ground, he should prove that he has been coerced into or suspended from practising in his preferred religious activities held on Saturdays. This contention, MrHangangu argued, has no basis in law. He went on to submit that the authorities demonstrate the contrary. Namely, that discrimination can occur indirectly, and that it is just unlawful as when it is done directly. That is, via legislation or a direct administrative measure.

MrHangandu submitted that while it squarely lies within the respondent's competence as a professional statutory body to organise and hold the AGM and similar such programmes in the country, the law and the Constitution require that in doing so, the respondent must not directly or indirectly discriminate against any *bonafide* member on any outlawed grounds, such as religious creed. And he maintained that this is precisely the essence of the complaint before me: that in spite of having been officially placed on notice, the respondent in convoking the AGM and other of its programmes has operated its affairs in such a way or to effectively and indirectly bar him from participating in its programmes held during the Sabbath.

In view of the foregoing, MrHangandu prays that:

(a) it may be determined and declared that his fundamental right to freedom of conscience and not to be discriminated against on the ground of his religious creed have been contravened, contrary to Articles 19(2) and 23(2) of the Constitution;

(b) it may be determined, ordered, and directed that the respondent whether by itself, its agents or otherwise howsoever be refrained and an injunction granted refraining it from holding or transacting any of its formal meetings during the Sabbath, i.e. between Friday sunset and Saturday sunset; and

(c) the Court may make such order, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights provisions allegedly violated in relation to the petitioner pursuant to Article 28(1) of the Constitution of Zambia.

On 18th October, 2011, MrSimeza filed into Court the respondent's submissions. MrSimeza noted at the outset that the claim to infringement of the petitioner's fundamental rights under Article 11(a) was abandoned during the hearing and therefore, will not be argued.MrSimeza however observed that the petitioner maintains that his claim is that his freedom of conscience has been, and continues to be violated by the respondent. MrSimeza noted that Article 19(1) is in these words:

"19(1) Except with his own consent a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article the said freedom includes freedom of thought and religion, freedom to change his religion or belief and freedom either alone or community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice, and observance."

MrSimeza submitted that following the inclusion of religion in the freedom of conscience under Article 19(1), his submission of what the concept entails draws credence from the body of case law in the Commonwealth. A case in point, MrSimeza submitted, is the decision of the Supreme Court of Canada in *Queen v Bih M Drug Mart Limited (Others Intervening) [1986] L.R.C. Court 332,* where the following observation was made at page 359:

"The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal. But the right means more than that....

Freedom can primarily be characterised by the absence of coercion or constraint. Freedom in a broad sense embraces both the absence of coercion and constraint... and the right to manifest beliefs and practices. Freedom means that subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

MrSimeza submitted that equally insightful is the decision of the Supreme Court of Malaysia in *Minister of Home Affairs and Another v Jamaluddin Bin Othman (1990) LRC Court 380,* where the following observation was made:

"I am of the view that the Minister has no power to deprive a person of his right to profess and practice religion which is guaranteed under Article 11 of the Constitution. If the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with the provision of Article 11 and, therefore, any order of detention would not be valid."

MrSimeza argued that it follows therefore, that freedom of conscience is characterised by the right to profess and exercise one's beliefs without restriction, constraint, or coercion. However, in the quest to determine what would constitute a violation of freedom of conscience as guaranteed by Article 19(1) of the Constitution, my attention was drawn to the case of *Kachasu v Attorney General (1967) Z.R. 145,* where the alleged violation of section 21(1) of the independence Constitution was in issue. In the *Kachasu* case (saupra) the following observation was made by Blagden, J, at page 160:

"Section 21 deals specifically with the protection of the freedom of conscience. It is divided into five subsections. Subsection (1) and (2) read as follows:
"1 Except with his own consent no person shall be hindered in the enjoyment of his freedom of conscience and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and

propagate his religion or belief in worship, teaching, practice, and observance.

In determining, therefore, whether there has been any breach of the applicant's rights to her freedom of conscience here, it is necessary to see first whether in fact she has been or is being or is likely to be hindered in the enjoyment of her freedom of conscience or religious thought. It is to be noted that the operative word is "hindered", not "prevented". Nor is there any qualification of the word "hindered". Even a slight degree of hindrance, therefore, will be relevant and may constitute a contravention of section 21."

MrSimeza argued that it follows, therefore, that hindrance being the antithesis of freedom of conscience, an infringement by the respondent cannot be established without showing to the Court that the petitioner's exercise of freedom was affected by some constraint, restriction, or form of coercion to which he was subjected to by the respondent.

Furthermore, he submitted that in his proposition that constitutional matters are no exception to the general rule that the burden of proof (other than criminal cases) is borne by theproponent of the case, he is fortifiedagain by the case of *Kachasu* (supra) where Blagden observed at page 162 that: *"The onus is clearly on the appellant to prove that she has been so hindered, and I have no hesitation in holding that she has successfully discharged this burden."*

My attention was also drawn to the case of the *People v Mwape and Mmembe HPR/36/94* (unreported) where it was observed that:

"It is appropriate to start with the submissions dealing with the question of who bears the burden of proof. It is not in dispute that the applicant's bear the burden to prove that their fundamental freedom has been contravened. and that the provisions which are alleged to have hindered the applicants in the enjoyment of their fundamental freedom are not favourably justified in a democratic society."

MrSimeza also contended that the petitioner having involved this Court for redress under Article 28 of the Constitution, he must prove not only that his freedom under Article 19(1) was hindered by some coercion, restriction, or constraint by the respondent, but must also demonstrate that such hindrance was occasioned by some positive act on the part of

the respondent. In advancing this proposition, MrSimeza drew my attention to the case of *Nkumbula v Attorney General (1972) Z.R. 204.*In the *Nkumbula*case (supra), redress was sought under section 28 of the Constitution, which provision is identical to the current Article 28 of the Constitution. This is what Baron, JP, said at pages 211-212:

"It is unnecessary to refer to any detail to the recent decisions of this Court in which it has been stressed that no provisions can be read and construed in isolation; any word or phrase or provision in an enactment must be construed in its context.

The relevant portions of section 28 are:

"Subject to the provisions of subsection 6 of this section, if any person alleges that any of the provisions of section 13 to 26 (inclusive) of this Constitution has been or is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter or other which is lawfully available, that person may apply to the High Court for redress....

I entertain no doubt whatsoever that this section applies only to executive or administrative action (or exceptionally, action by a private individual) and that this is so is underlined by the existence of the words "in relation to him".

It is common cause that no executive or administrative action has been taken in relation to the appellant and it is not alleged that any such action is threatened. Section 28 cannot, therefore, be involved.

MrSimeza submitted that the petitioner acknowledged, or admitted that a positive or overt act on the part of the respondent is key to actionable infringement.

In considering the evidence in this matter, MrSimeza submitted that the issues that fall to be determined are, first, whether there has been some positive act by the respondent; and second, whether the act in question has hindered by restraint, constraint, or coercion, the petitioner's enjoyment of the freedom of conscience. As regards the first issue, MrSimeza invited me to take judicial notice of the fact that the respondent has been in existence since 1965. Further, that the undisputed evidence on record is that the practice of the respondent transacting business on days that coincide with the Sabbath precedes both the petitioner's

conversion to Adventism in 2003, and his admission to the bar and enrolment as a member of the respondent in 1996. Thus, MrSimeza argued, that there is no evidence of any change(s) on the part of the respondent after 2003, that have been effected, and implemented which have affected the petitioner's enjoyment of the freedom of conscience. Put differently, MrSimezaargued that the practice of holding the AGMs on Saturdays commenced way before the petitioner migrated his faith from Catholicism to Adventism. In the circumstances, the petitioner has not proved that there has been any positive act taken by the respondent in the sense of the *Nkumbula* case (supra), MrSimeza concluded.

In relation to hindrance of the freedom of conscience,MrSimeza submitted that the evidence on record is that in 2003, the respondent freely and voluntarily converted to Adventism, and has continued to enjoy his freedom of conscience ever since. The decision to convert to Adventism, MrSimeza argued, was made without any hindrance from the respondent. MrSimeza submitted that there is equally no record or evidence of any sanction or detrimental measures that have been taken by the respondent as a result of the petitioner's Adventist beliefs or his inability to attend the respondent's AGM. The petitioner has been free to profess and practice his SDA faith without any constraint, restraint, or coercion, MrSimeza submitted. It follows, therefore, MrSimeza argued, that the petitioner has not laid any evidence to show any hindrance by the respondent in the enjoyment of his freedom of conscience in the *Kachasu* sense (supra).

MrSimeza also submitted that listening to the testimony of the petitioner, one got the impression that his complaint borders on his inability to attend the respondent's AGM since he converted to Adventism. In this vein, MrSimezaargued that the petitioner wants the respondent to shift the day for holding its AGM to say Sunday, so that he can be able to attend the AGM. MrSimeza submitted that the petitioner appears to proceed from a clear misapprehension of the spirit and purpose of Article 19(1) of the Constitution which guarantees freedom of conscience.

MrSimeza's understanding of Article 19(1) is that the hindrance or constraint ought to be in relation to his ability to enjoy or practice his religious beliefs.

Further, MrSimezaargued that the petitioner should have laid evidence to show the overt acts by the respondent which have fettered his ability to enjoy his freedom of thought and religion. The hindrance or constraint, MrSimeza went on, should not relate to his own self-inflicted inability to do certain things on the Sabbath, on account of religious beliefs such as attending the AGM, of the respondent. MrSimeza maintained that the respondent has never hindered or prevented the petitioner from attending its AGM, or indeed any of its activities such as ascending to the leadership of the respondent, or belonging to any of its Committees. Thus MrSimeza urged me to dismiss the petitioner's claim for infringement of his rights under Article 19(1) because not only is it not supported by evidence on record, but is absurd, and mischievous.

MrSimezanoted that the petitioner has also put forward a claim that the respondent has discriminated, and continues to discriminate against him by virtue of his Adventist beliefs. In this connection, the petitioner has relied on Article 23(2) which enacts that:

"(2) subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office, or any public authority."

MrSimeza submitted that the framers of the Constitution were gracious enough to supply a definition of the term discriminatory in Article 23(3) as follows:
"3 In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description."

MrSimeza submitted that the term *"creed"* is defined by the Oxford Advanced Learner's at page 274, as *"A set of principles or religious beliefs."*

MrSimeza also drew my attention to the case of *Wina and Others v the Attorney General (1990 – 1992) Z.R. 95,* where it was alleged that Article 25(2) of the One Party State Constitution had been violated. This whatMusumali, J said:*"Article 25(1)*

(2) Subject to the provisions of clauses (5), (7) and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any authority.

(3) In this Article the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour, or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description."

Justice Musumali, went on to observe at page - that:

"The next issue arising from my finding is: did the directive discriminate between the petitioners and their members on the one hand and those who held views similar to those held by the President on the other hand? The answer again is in the affirmative. The nature of the directive is such that it cannot command any other interpretation even from those really hostile to the petitioners. That discrimination was against the petitioners, and their followers and in favour of the UNIP leaders and their members.

The directive was discriminatory of the petitioners and their cadres. The reason for the discrimination was that they had held different political views from those of the President and his members. The newspaper which were given the directive are owned by the Government. In the light of these findings, the directive would be unconstitutional unless it falls within one of the permitted derogations."

The second case that was brought to my attention based on Article 23 of the Constitution is the case of *Nawakwi v Attorney General (1990 – 1992) Z.R. 112.* In the*Nawakwi*case (supra), again Musumali, J, made the following observation at page - :

"Be that as it may my very considered view is that the intentions of the framers of this Constitution when they passed the Bill of Rights (Part III) could never have been to discriminate between males and females in the way the passport office, and its sister department have been doing. I have no doubt in my mind, therefore, that if these practices were to have been brought to the attention of those people who were passing this Constitution into law, they would not have sanctioned them. I am not sanctioning them either. Forms A and D of the Passport Office have not been issued on the basis of any legal provision. And even if they were so issued, that law would be unconstitutional as it would be discriminatory between mothers and fathers in matters relating to their children's inclusion in the mother's passports or getting passports or travel documents for no good reason than the fact that one is a female, and the other a male.

The third case that was brought to my attention on discrimination is the case of *Phiri v Bank of Zambia (2007) Z.R. 186*. In the Phiri case (supra) Chitengi, JS, made the following observation at pages 195 – 196:

"What we have to decide is whether on the evidence, discrimination was not proved as the learned trial judge held. We have carefully considered the evidence on this issue. We accept MrMulenga's submissions, and the learned trial judge's finding that there was no discrimination proved. AsMrMulenga rightly submitted, there is no evidence that the other persons who were not discharged also bounced numerous cheques like the Plaintiff did.

As the learned trial judge quite rightly pointed out, there is no evidence that the breaches by the other persons here were like those committed by the Plaintiff for one to say that the Plaintiff and those others who were not dismissed were similarly circumstanced. The learned trial judge was on firm ground when he found that the Plaintiff was not discriminated against."

MrSimeza submitted that the need for a comparative analysis when a Court is faced with a claim of discrimination is not unique to the Zambian jurisdiction. In this vein, MrSimeza cited a judgement that was handed down by the High Court of Trinidad and Tobago in *Ramlogan v The Mayor of San Fernando [1986] L.R.C. 377*, when it observed at page 391 that:

"As far as the applicant's claims under sections 4(b) and 4(d) of the Constitution are concerned, I do not find any evidence that the applicant was treated less equally than any other individual similarly circumstanced, or that the applicant was discriminated against."

MrSimeza submitted that it follows, therefore, that this limb of the petitioner's claim-being discriminated against turns on whether there had been any evidence adduced by the petitioner to show how he has been treated differently by the respondent. In this regard, MrSimeza posed the following questions: what has the respondent done to the petitioner to warrant a complaint of discrimination? Is there evidence to show that there has been a similar complaint by another member, or members of the respondent who held different religious beliefs from the petitioner?and which complaint was dealt with differently?

MrSimeza pointed out that during cross-examination of the petitioner, he admitted that although the respondent has a membership of close to 1000, which included of course non-SDA members, he does not know of any other member who has complained to the respondent about holding of the AGM's on Saturdays-Sabbath.

Further, MrSimeza submitted that the petitioner is on record that his complaint was rejected at the respondent's AGM of 25th April, 2009. He maintained that there is no evidence on record to suggest that the respondent schedules its meetings and activities to suit the convenience of any particular religious grouping over that of another. Therefore, in the absence of evidence that a similarly circumstanced member of the respondent complained, and that their complaint received more favourable treatment than that of the petitioner, there can be no comparison upon which to base and answer the question of any alleged discrimination, MrSimeza argued. He pressed that discrimination is founded on the premise that different persons are accorded different privileges or advantages, which are not accorded to persons of another description.In fact, MrSimezaargued, that the effect of the relief sought by the petitioner in this case would be to sanction discrimination against the respondent's non-SDA members in favour of its SDA members in that activities and meetings would then be held on any day other than that which SDA members consider to be reserved for non-secular activities. MrSimeza urged me to dismiss this part of the claim as well.

I am indebted to counsel for the spirited arguments and well researched submissions. The question that falls to be determined is narrow, and also the facts giving rise to the dispute are not controversial. In the main the petitioner contends that the respondent has been, is being, and is likely to continue violating his freedom of conscience. The basis of the allegation is as follows:

"...*the respondent has willfully set out and operated its affairs in well crafted discriminatory manner that has excluded the petitioner from participating in the professional affairs of the respondent by virtue of the fact that the petitioner is a member of the SDA."*

Furthermore, the petitioner contends that by long standing custom and usage, the respondent has routinely held its AGM on a Saturday to conduct its business. The practice has continued despite the petitioners formal complaints that: *"his fundamental right to religious liberty and freedom faith based segregation should be upheld by the respondent's alteration of the days of convening meetings so that they are not held on the holy Sabbath."*

In essence, the petitioner has advanced two ground of arguments. The first is that the respondent has, and willfully continues to contravene Article 19(1) of the constitution that protects the freedom of conscience. Under the second ground of argument, he contends that the respondent willfully continues to contravene his fundamentals freedom or protection from discrimination on the basis of his religious creed as provided in Article 23(1) of the Constitution, by conduction its business on Sabbath, despite his formal complaints as a *bona fide* member of the respondent.

Conversely the respondent denies that it has neither violated the petitioner's freedom of conscience, nor conducted its affairs in a discriminatory manner that has resulted in excluding the petitioner from participating in the affairs of the respondent on the basis that the petitioner is a member of the SDA. The respondent contends that the practice of holding its AGM, and other meetings on Saturdays has been in

place from time immemorial, and even before the petitioner's professed conversion to SDA. Further, the respondent contends that the holding of the meetings is based on the consent of the majority of the members of the respondent. And therefore has no nexus to the exercise of any religious activity.

PLESSY V FERGUSON

In bid to vindicate the violation of his fundamental rights, the petitioner drew to my attention a plethora of American cases. I will therefore proceed to review the major cases. The first is *Plessy V Fergusson 163 U S 357, 16 Sct 138, 41 LEd [1896].* The facts of the case were that, Plessy attempted to sit inanall-white rail road car. After refusing to sit in the black railway carriage car, Plessy was arrested for violating an 1890 Louisiana statute that provided for segregated "separate but equal", railroad accommodations. Those using facilities not designated for their race were criminally liable under the statute. At trial with Justice John H Gerguson presiding, Plessy was found guilty on the grounds that the law was a reasonable exercise of the State's police powers based upon usage and tradition in the State.

Plessy filed a petition for writs of prohibition and certiorari, in the Supreme Court of Louisiana against Ferguson, asserting that segregation stigmitised black and stamped them with a badge of inferiority in violation of the Thirteenth and Fourteenth Amendments. The issue that fell to be determined was whether the State could constitutionally enact legislation requiring persons of different races to use "separate but equal" segregated facilities. The Court held that States could constitutionally enact legislation requiring persons of different races to use separate but equal segregated facilities. The statute in question was held not to conflict with the Thirteenth Amendment which abolished slavery and servitude. The Court went on to hold that laws permitting and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race. Such

laws were generally recognised as being with the scope of the State's police powers.

Lee Epstein and Thomas G. Walker, in Constitutional Law for a Changing America: Rights, Liberties, and Justice (Washington DC, Q Press, 2010) observe at page 590, that the *Plessy* decision's separate but equal doctrine ushered in full scale segregation in the Southern and border States. According to the Court, separation did not constitute inequality under the Fourteenth Amendments;if the facilities and opportunities were somewhat similar, the equal protection clause permitted the separation of the races.

EVERSON V BOARD OF EDUCATION

The second case to be considered is *Everson v Board of Education 330 U.S 1 [1947]*. The facts of the case were that in 1941, New Jersey passed a law authorising local school boards that provided "any transportation for public school children to and from school," also to supply transportation to children living in the district who attended non-profit private schools. At the time New Jersey enacted this legislation, at least fifteen other States had similar laws. Ewing Township decided to use tax dollars to reimburse parents for transportation costs incurred in sending their children to school. Because the township had no public high schools of its own, the reimbursement policy covered transportation expenses to parents sending their children to three neighbouring public schools. It also covered four private schools, all of which were affiliated with the Roman Catholic Church, and provided regular religious instruction along with normal secular subjects. The average payment to parents sending their children to public and Catholic schools was $40 per student.

Arch Everson, a taxpayer living in the district, challenged the reimbursements to parents sending their children to religious schools. He claimed that this money supported religion in violation of the establishmentclause of the First Amendment. It was argued on behalf of Everson that the concept of liberty embodied in the due process clause of

the Fourteenth Amendment embraces the fundamental freedoms protected by the First Amendment. And that the transportation programme allowed public money to be used in support a religious purpose contrary to the First and Fourteenth Amendments.

On behalf of the Board, it was pointed out that in *Cochran v Board of Education [1930]*, the Court upheld making text books available to school children. In any event, it was pointed out that the State law authorises local districts to fund transportation for all students attending non-profit schools, public or private. There was no establishment of religion. The aid did not go to any religious institution. In a word, in *Everson v Board of Education* (supra), the New Jersey statute was challenged as a "law respecting an establishment of religion."

Mr Justice Black delivered the opinion of the Court. He pointed out at the outset that the First Amendment Commands that a State: *"Shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."*In order to appreciate the meaning of the language of the First Amendment, Justice Black reviewed the background and environment of the period in which that constitutional language was fashioned and adopted. The background was explained in the following terms: a large proportion of the early settlers in America came from Europe to escape the bondage of laws which compelled them to support and attend government favoured churches.

The centuries immediately before, and contemporaneous with colonisationof America had been filled with turmoil, civil strife, and persecutions generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them at various times, and places, Catholics had persecuted protestants, protestants had persecuted other protestants sects, Catholics of one shade of belief, had persecuted Catholics of another shade of belief, and all these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to

be on top, and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.

These practices of the old world were transplanted to and began to thrive in the soil of new America. The very charters granted by the English Crown to the individuals, and companies designed to make the laws which would control the destinies of the colonials authorised these individuals and companies to erect religious establishments which all whether believers or non-believers would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old world practices and persecutions.These practices became so common place as to shock the freedom loving colonials into a feeling of abhorrence. The imposition of taxes to pay Ministers salaries, and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment.

The meaning and scope of the First Amendment, preventing the establishment of religion or prohibiting the free exercise thereof in light of its history and the evils it was designed forever to suppress had been several times elaborated by the decisions of the Supreme Court prior to the application of the First Amendment to the States by the Fourteenth. The broad meaning given by the Amendment by these earlier cases has been accepted by the Supreme Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to State action abridging religious freedom.Justice Black observed that there was every reason to give the same application and broad interpretation to the establishment of religion clause: He went on to state that the:

"establishment of religion" clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church, neither can pass laws which aid one religion, aid all religious or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs for church

attendance or non-attendance. No tax in any amount large or small can be levied to support any religious activities or institutions whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can openly or secretly participate in the affairs of any religious organisations or groups and vice versa. In the words of Jefferson the clause against establishment of religion by law was intended to erect "a wall of separation between the church and the state."

Justice Black went on to observe that the New Jersey statute, had to be considered against the backdrop of the limitation imposed by the First Amendment. The legislation was not to be struck down if it was within the State's constitutional power even though it approached the verge of that power. New Jersey could not consistently with the "establishment of religion clause" of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion.Measured by these standards, it could not be said that the First Amendment prohibited New Jersey from spending tax raised funds to pay the bus fares of parochial school pupils as a part of general programme under which it pays the fares of pupils attending public and other schools. It was undoubtedly true that children were helped to get to church schools. But it was held that the State contributes no money to the schools;it does not support them. Ultimately,justice Black pressed that the First Amendment erected a wall between church and state. That wall had to be kept high and impregnable. And the Court could not approve the slightest breach, and New Jersey had not breached it.

BROWN V BOARD OF EDUCATION

The third case that will be reviewed is *Brown v Board of Education 347 US 483 [1954].* In this case, the Court consolidated five cases involving similar issues for consideration at the same time. *Brown v Board of Education* (supra) was one of these cases. These cases challenged the segregated public schools of Delaware, Kansas, South Carolina, Virginia, and the District of Columbia. The suits were unsuccessful at the trial

level, with lower Courts relying on *Plessey* as precedent. The facts in *Brown v Board of Education* (supra), were that Linda Carol Brown was an eight year old black girl whose father Oliver Brown, was an assistant pastor of a Topeka Church. The Browns lived in a predominantly white neighbourhood only a short distance from an elementary school under State law, cities with populations over fifteen thousand were permitted to administer segregated schools, and the Topeka Board of Education required its elementary schools to be racially divided.

The Browns did not want their daughter to be sent to the school reserved for black students. It was far from home, and they considered the trip dangerous. In addition, their neighbourhood school was a good one, and the Browns wanted their daughter to receive an integrated education. They therefore filed suit challenging the segregated school system as violating their daughters rights under the equal protection clause of the Fourteenth Amendment. It was argued on behalf of Linda Brown that first, when distinctions are imposed by the State based on race and colour alone, the actions are patently arbitrary and capricious and in violation of the Fourteenth Amendment. Second, that evolution of the Supreme Courts racial discrimination jurisprudence had rendered *Plessy V Fergusson* (supra) no longer applicable. Third, social science evidence clearly establishes that official racial separation is detrimental to the segregated group no matter how equal the facilities. Among other adverse effects, segregation instills a sense of inferiority.

On behalf of the Board it was argued that first, by any measure of the quality of physical facilities, curriculum, teacher training, and school transportation, the segregated schools in Topeka were equal. Second, *Plessy v Ferguson* (supra), remained good law, and should control the case. And lastly, there were no findings that the specific children involved in the litigation had suffered any damages from attending segregated schools.

Chief Justice Warren delivered the opinion of the Court. He observed that in approaching the problem, the Court could not turn the clock back to 1868, when the Amendment was adopted, or even to 1896 when *Plessy v Ferguson* (supra) was written. The Court had to consider public education in the light of its full development and its place in American life throughout the nation. Only in that way could it be determined if segregation in public schools deprived the plaintiff's of the equal protection of the law.

He acknowledged that: education was perhaps the most important function of State and local governments. Compulsory school attendance laws and great expenditures for education both demonstrated the recognition of importance of education to society. It was required in the performance of most public responsibilities. It is the foundation of good citizenship. It is a principal instrument in awakening the child to cultural values, in preparing him for professional training, and helping him to adjust normally to his environment. He also noted that it was doubtful that any child could be reasonablybe expected to succeed in life if he was denied the opportunity of education. Such an opportunity where the State had undertaken to provide it, was a right which had to be made available to all on equal terms.

In essence Chief Justice Warren considered that segregation of white and coloured children in public schools had a detrimental effect upon colouredchildren. The impact was greater when it had the sanction of the law; for the policy of separating the races was usually interpreted as denoting the inferiority of the negro group. As sense of inferiority affected the motivation of a child to learn. Segregation with the sanction of the law had tendency to retard the educational and mental development of negro children and to deprive them of the benefits they would receive in a racially integrated school system. He also observed that whatever may have been the extent of psychological knowledge at the time of *Plessy v Ferguson* (supra), the preceding findings were supported by modern authority. He therefore concluded that in the field of public education, the

doctrine of separate but equal has no place. Separate educational facilities were inherently unequal. Ultimately, Chief Justice Warren held that the plaintiffs and others similarly situated for whom the actions had been brought were by reason of the segregation complained of, deprived of the equal protection of the law guaranteed by the Fourteenth Amendment.

BRAUNFELD V BROWN

The fourth case I will consider is the case of *Braunfeld v Brown 366 US 5998.* This is one of several cases the Supreme Court heard in 1961, involving the so called "blue laws". The ordinances required businesses offering goods and services not essential to close on Sundays. Abraham Braunfeld, an orthodox Jew, owned a retail clothing and home furnishing store in Philadelphia. Because under State law, such stores were not among those permitted to remain open on Sunday, Braunfeld wanted the Court to issue a permanent injunction against the law. His religious principles dictated that he could not work on Saturday, the Jewish Sabbath, but he needed to be open six days a week for economic reasons. He challenged the law as a violation of among other things his right to exercise his religion.

Writing for the majority, Chief Justice Warren upheld the constitutionality of blue laws, and restated the belief-action dichotomy when he said:

"*Certain aspects of religious exercise cannot in any way, be restricted or burdened by either Federal or State legislation. Compulsion by law of acceptance of any creed or practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute."*

Chief Justice Warren went on to hold that:

However, the freedom to act, even where the action is in accord with one's religious convictions is not totally free from legislative restrictions .... Legislative power over mere opinion is forbidden but, it may reach people's actions when they are found to be in violation of important social duties and subversive of good order, even when the actions are demanded by one's religion. Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of the law is to impede the observance of one or all religions or is

to discriminate individuals between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law withinits powers, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

SHERBERT V VERNER

The last case that I will review is *Sherbert v Verner 374 US 398 [1963]*. The facts of the case were that AdellSherbert was a spool tender in Spartanburg, South Carolina Textile Mill, a job she held for thirty five years. Sherbert worked Monday through Friday from 7 pm to 3 pm. She had the option of working on Saturdays, but chose not to. Sherbert was a member of the SDA, which held that no work could be performed between sundown on Friday, and sundown on Saturday. In other words, Saturday was her church's Sabbath. On June 5, 1959, Sherbert's employer informed her that starting the next day, work on Saturdays would no longer be voluntary: to retain her job she would need to report to mill every Saturday. Sherbert continued to work Monday through Friday, but in observance of her religious beliefs did not work on six successive Saturdays. Her employer dismissed her on July 27.

Between 5th and 7th July 27, Sherbert had tried to find a job at three other textile mills, but they too operated on Saturdays. Sherbert filed for State unemployment benefits. Under South Carolina law, a claimant who is eligible for benefits must be "able to work… and available for work"; a claimant is ineligible for benefits if he or she has "failed without good cause … to accept available suitable work when offered … by the employment office or the employer." The benefits examiner in charge of Sherbert's claim turned her down on the ground that she failed, without good cause to accept "suitable work when offered" by her employer. In other words, her religious preference was insufficient justification for refusing to accept a job.

Sherbert and her lawyers filed suit in a South Carolina State Court which ruled in favour of the employment office. After the State Supreme Court affirmed that decision, Sherberts lawyers asked the US Supreme Court to review the case. In the US Supreme Court, it was argued on behalf of Sherbert as follows: first that the conditioning State employment benefits on a person's willingness to work on her Sabbath required Sherbert to repudiate her religious belief by doing something that directly conflicts with the tenets of her church. Denying her unemployment benefits constitutes economic coercion to give up a religious belief. Second, the Saturday work is not essential to accomplish the State's policy objectives. And third, requiring work on Saturday is discriminatory and arbitrary in violation of the First and Fourteenth Amendments.

On behalf of the Verner and South Carolina Employment Security Commission, it was argued, first that denying Sherbert her unemployment benefits does not constitute coercion to work on Sabbath in violation of the free exercise clause. Second, the benefits policy is a valid and necessary regulation to advance the State's secular interest in achieving stable employment by awarding benefits to those who have tried and failed to find work, while denying benefits to those who have turned down a job. And lastly, that the law does not prohibit any form of religious belief or practice and was not designed to discriminate against those who observe the Sabbath on Saturday. The economic burden on Sherbert is not greater than the Court previously permitted in *Braunfeld and Brown*(supra).

The opinion of the Court was delivered by Justice Brenan. The first question that the Court considered was whether the disqualification for benefits imposed any burden on the free exercise of appellant's religion. The Court considered that it did. Whilst justice Brenan noted that it was true that no criminal sanctions ensued to compel the appellant to work a six-day week, that was only the beginning of the inquiry; not the end of

the inquiry. Justice Brenan observed following the decision in *Braunfeld v Brown*(supra) that if the purpose or effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.

Justice Brenan went on to observe that it is not only apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forced her to choose between following the precepts of her religion on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand. He noted that governmental imposition of such a choice put the same kind of burden upon the free exercise of religion as would a fine imposed against the appellant for her Saturday worship.

The learned authors of Constitutional Law for a Changing America: Rights, Liberties and Justice observe at page 101 (supra), that Brennan's majority opinion in *Sherbert v Verner* (supra), represented a significant break from past free exercise claims. No longer would a secular legislative purpose suffice. Rather, under *Sherbert*, when the government enacts a law, it must show it is protecting a compelling government interest, and doing the least restrictive manner possible. The learned authors also note that *Sherbert* represented a step away from previous exercise cases in which the Court insisted on neutrality for in Sherbert, the Court struck down a law that was neutral in application on the ground that it hindered the free exercise of religion with less-than-compelling interest.

KACHASU V ATTORNEY GENERAL

I will now pass to review two of the cases relied on by the respondent in resisting the claims by the petitioner; the cases of*Kachasu v Attorney General 1967 Z.R. 145;* and *Nkumbula v Attorney General (1972) Z.R. 204.* The *Kachasu*(supra) was an application brought before the High

Court by FeliyaKachasu, a young girl aged between eleven and twelve years through her father, Paul Kachasu as next friend. The applicant's father was a Jehovah Witness. And the applicant herself had been brought up in the religion of Jehovah Witnesses and had been taught that it is against God's law to worship idols or to sing songs of praise or hymns to other than Jehovah himself. The applicant and her father and many other Jehovah Witnesses regarded the singing of the national anthem as the singing of a hymn or prayer to someone other than Jehovah God himself. They also regarded the saluting of the national flag as worshiping an idol. To them, the singing of national anthem and saluting of the national flag were religious ceremonies or observances in which they could not actively take part, because these ceremonies were in conflict with their religious views and beliefs.

On 2nd September, 1966, there was brought into force The Education (Primary and Secondary Schools) Regulations, 1966. By regulation 25 of the same, pupils at these schools were required to sing the national anthem, and salute the national flag on certain occasions.By regulation 31(1)(d), the Head of a school was empowered to suspend from school any pupil who willfully refused to sing the national anthem, or to salute the national flag when lawfully required to do so. In October, 1966, the applicant refused to sing the national anthem, and she was suspended from school.There followed some interviews between the applicant's father and the school authorities, in the course of which the father endeavored to explain that the reason for the applicant's refusal to sing the national anthem was that it was against her religious conscience to do so. The applicant's father asked the school authorities for her to be reinstated at the school, and to be excused from singing the national anthem or saluting the national flag. It was however made clear to the applicant's father that the applicant could not be re-admitted to school unless she agreed to comply with the regulations, and sing the national anthem and salute the national flag when required to do so. As a consequence, the applicant stopped attending school.

Thus, by her notice of motion, the applicant asked the Court to say that the suspension was unlawful and that she was entitled to re-admission to the school without having to give any undertaking that she would sing the national anthem or salute the national flag. The notice also set out the grounds on which the applicant based her claim. The grounds included the assertion that the suspension constituted a hindrance in the enjoyment of her freedom of conscience, which included the freedom of thought and of religion as provided in chapter III of the Constitution of Zambia.

In delivering the judgment, Blagden, J, referred to the American case of *Disti v Gobitis 310 US 586 [1940],* which similarly concerned the refusal of two pupils to participate in the flag salute ceremony at their school. Frankfurten, J, opened his judgment with the following words:

"A grave responsibility confronts this Court whenever in the course of litigation, it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nations fellowship. Judicial conscience is put to its severest test."

I also similarly feel that in this case my judicial conscience has been put to a severe test.

Be that as it may, in the *Kachasu*case (supra),Blagden, J, went on to observe that the case raised two main issues. The first is what he called the constitutional issue. The second issue was the legislative issue.Under the constitutional issue, the applicant claimed that her suspension from school and, it would follow, the refusal of her application for unconditional readmission, constituted a hindrance in the enjoyment of her right to freedom of conscience, thought, and religion guaranteed by sections 13 and 21 of the Constitution. Further, she claimed that the regulations under which she came to be suspended, that is, regulations 25 and 31 (1) (d) of the Education (Primary and Secondary Schools) Regulations, 1966, are themselves in conflict with section 21 of the Constitution, and

consequently invalid. Under the second issue – the legislative issue – the applicant's case was quite simply that regulations 25 and 31 (1) (d) were invalid because they were in conflict with the Education Act, 1966, under which they were made. In this discussion of the *Kachasu*case (supra), I will confine myself to the constitutional issue.

Blagden, J, observed at page 160 of the judgment as follows:

"Section 28 [the equivalent of the current Article 28 of the Constitution] of the Constitution, which I have already quoted, empowers this Court to grant redress to any person who proves to it that any of the provisions of section 21 (amongst other sections), has been, is being or is likely to be contravened in relation to such person. The opening words of section 21(1) are: "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience."

Blagden, J, explained that section 21(1) amounts to this: an applicant has to satisfy the Court that, without his or her own consent, he or she has been, is being, or is likely to be hindered in the enjoyment of the freedom of conscience. He noted that: the key or operative word is "hindered". In this regard even a slight degree of hindrance will be relevant and would constitute a contravention of section 21. The onus is on the applicant to prove that he or she has been so hindered.

On the facts of the *Kachasu*case (supra) Blagden, J, held that the applicant was hindered in the enjoyment of her freedom the moment she was put under coercion to sing the national anthem against her religious beliefs. For at that moment she was not free to give expression to her religious convictions, albeit passively by refraining from joining in what she considered to be a hymn of praise to other than Jehovah's God himself.Furthermore, Blagden, J, held that the applicant was hindered and was likely to be hindered in future, as in as much as whilst she was free to enjoy her freedom of conscience in most of Zambia, she was not so free on the premises of any government or aided school to which she would ordinarily be entitled to admission. And in any case she anticipated that if she secured such admission, she would be subjected again to the same

coercion which she had already experienced to act against her religious beliefs.

Notwithstanding, Blagden, J, observed that bearing in mind the compelling need of national unity and national security, without which there could be neither certainty of public safety, no guarantee of individual rights and freedoms, he considered it, a reasonable requirement that pupils in government and aided schools should sing the national anthem and salute the national flag. He did not consider that requirement – to sing the national anthem and salute the national flag – to be unreasonable; which is what substantially, the applicant had to prove. And if a thing is not unreasonable, he went on, there is little if any room for anything in between.

Blagden, J, also noted that the position would have been different if the requirement to sing the national anthem and salute the national flag went outside government aided schools. Then it would not be reasonable. That aside, the true position was that the applicant was not compelled by the State to sing the national anthem or salute the national flag. She was only required to do so as a condition – along with other conditions – if she wished to attend a government or aided school. That is to say, if she chose to accept education provided or financed by the government. This Blagden, J, noted, seemed reasonable. Blagden, J, pressed that the applicant was not compelled to attend a government school. And education was not, and is still not compulsory in Zambia. Further, the applicant was not as a result of the measure – to sing the national anthem and salute the flag – denied freedom of religion. She was free to practice her religion as she pleased. Blagden, J, considered that it was not really her freedom of religion which was invaded; but rather it was her freedom of education; but that is not a freedom which was guaranteed by the Constitution.

The findings of Blagden, J, may be summarized as follows:

1. the applicant suffered hindrance in the enjoyment of her freedom of conscience in that she had been coerced to sing the national anthem at Buyantanshischool contrary to her religious conscience, and that she had been suspended from school and denied re-admission in consequence of her refusing to sing the national anthem or salute the national flag; and
2. such hindrance however did not constitute the contravention of her right to the enjoyment of freedom of conscience secured to her by section 21 of the Constitution, in as much as that hindrance was reasonably justified in a democratic society, and was authorized by laws which were both reasonably required in the interests of defence and for the purpose of protecting the rights and freedoms of other persons and themselves reasonably justifiable in a democratic society.

In a word, the applicant failed to establish that any of the provisions of section 21 had been, or were likely to be contravened in relation to her. And that she was entitled to any redress under section 28 of the Constitution.

NKUMBULA V ATTORNEY GENERAL

I will now discuss the case of *Nkumbula v Attorney General (1972) Z.R. 204.* The facts of the case were as follows: On 25th February, 1972, the then President Kaunda announced that the Cabinet had taken a decision that the future Constitution of Zambia should provide for a One Party Participatory democracy, and that a Commission would be set up with the task of determining the form which that One Party Participatory democracy should take. Thus the function of the Commission would not be to consider whether or not there should be a One Party Participatory democracy. As a result of the preceding decision, the appellant applied to the High Court seeking a number of declarations, which were refused.

On appeal, before the Court of Appeal – the forerunner of the Supreme Court – the appellant advanced only two arguments. First, that the

appointment by the President of the Commission of Inquiry under section 2 of the Inquiries Act, cap. 181, was *ultra vires,* and void because the matters to be inquired into could not be "for the public welfare" within the meaning of those words as used in section 2. Second, that if the One Party State were introduced, the appellant's rights under section 23 of the Constitution – freedom of association – were likely to be infringed. I will restrict my discussion to the latter argument.

Before the Court of Appeal, it was argued that the Chief Justice sitting in the High Court misdirected himself when he held that the appellant's rights had not yet been infringed. And, therefore, such a declaration should not be granted. The Court of Appeal considered that the resolution of the matter depended on the construction to be placed on section 28(1) of the Constitution. The relevant portion of section 28 read as follows:

"Subject of the provisions of subsection (6) of this section, if any person alleges that any of the provisions of section 13 to 26 (inclusive) of this Constitution has been, is being, or is likely to be contravened in relation to him then without prejudice to any other action with respect to the same matter which is lawfully available that person my apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section;

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section;

And may make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 13 to 26 (inclusive) of this Constitution.

(4) Not relevant.

(5) No application shall be brought under subsection (1) of this section on the grounds that the provisions of sections 13 to 26 (inclusive) of this Constitution are likely to be contravened by reason of proposals contained in any bill which at the date of the application has not become law."

In a judgment delivered by Baron, JP, the Court of Appeal made the following observations in light of the preceding provisions. First, that the

existence of section 28(5), makes it clear that if the only step taken by the executive is the introduction of the bill in question, subsection (1) cannot be invoked; this view as reinforced by the existence of section 27 which provided the machinery for the testing of legislation prior to it becoming law.Second, section 28(1) of the Constitution had no application to proposed legislation of any kind; far less to a proposal to amend chapter III itself. Section 28(1) applied only to executive or administrative action; or exceptionally, action(s) by a private individual. And that is so is underlined by the existence of the words "in relation to him."Third, if there is on statute book an Act of Parliament, or subsidiary legislation which it is alleged contravenes the Constitution, it is not open to any individual to come to Court and ask for a declaration to that effect; before the individual has *locus standi* to seek redress, there must be an actual or threatened action in relation to him.

In the course of judgment, the Court of Appeal proffered several examples of how this may arise. First, if any individual is arrested under a provision of an Act which alleges is *ultra vires*the Constitution, he could in addition to any other remedy open to him proceed under section 28(1). Again if an individual had good ground for believing that some executive or administrative officer will take some action prejudicial to him and contravention of his rights under Chapter III of the Constitution he could proceed under section 28(1).Second if, a parent of a school child might have received a letter from the headmaster threatening expulsion if the child did not conform to certain rules; the parent need not wait for the actual expulsion, but could invoke section 28(1) if he alleges that to enforce such rules would contravene the provisions of chapter III. Third, a trader might have received an intimation form an executive officer indicating that a recommendation would be made for the revocation of his trading licence if certain conditions were not complied with; the trader would have *locus standi*, to proceed under section 28 to determine whether the imposition of such conditions, and the revocation of a licence in failure to comply with the conditions would be in contravention of his constitutional rights.The Court of appeal concluded in the *Nkumbula*case

(supra) that since no executive of administrative action had been taken in relation to the appellant, and it was not alleged that any such action was threatened; section 28 could not therefore be invoked.The thread that runs throughout the examples in the *Nkumbula* case (supra) is this: before Article 28(1) of the Constitution is invoked, there must be some action taken, or threatened against the person who alleges that his fundamental rights or freedoms are being or likely to be contravened in relation to him.

SUMMARY OF THE LAW

From the preceding discussion of both American and Zambian jurisprudence on the subject, the law may be summarized in the following terms. In the first place, the "establishment of religion" clause of the first amendment in the Constitution of the US means this: neither a State nor the Federal Government can set up a church, neither can pass laws which aid one religion over another, or aid all religions or prefer one religion over another. Further, it also means neither a State nor the Federal Government can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. Furthermore, no person can be punished for entertaining or professing religious beliefs or disbeliefs for church attendance or non-attendance (see *Everson v Board of Education*) (supra).

No tax can in any amount, large or small can be levied by any State or the Federal Government to support any religious activities or institutions whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can openly or secretly participate in the affairs of any religious organizations or groups. The *raison d'etat* for the First Amendment is to erect a wall of separation between the church and the State (see *Everson v Board or Educatio* (supra)).

Certain aspects of religious exercise cannot in any way be restricted or burdened by either Federal or State legislation. Compulsion by law of acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs, and opinion is absolute. However, the freedom to act even where the action is in accord with one's religious convictions is not totally free from legislative restrictions. Legislative power over mere opinion is forbidden. But it may reach citizens actions when they are found to be in violation of important social duties, or subversive of good order, even when the actions are demanded by one's religion (see *Braunfeld v Brown* (supra)).

To hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power the purpose of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance, unless the State may accomplish its purpose by means which do not impose such a burden (see *Braunfeld v Brown* (supra), and also followed in *Sherbert v Vernar* (supra)).

If I may at this juncture interpolate in the summary, the judgment of the Constitutional Court of South Africa in *Christian Education South Africa v Minister of Education (2000) 9 BHR C53.* In that judgment Sachs, J, observed at pages 68 -70, paragraph 35 as follows:

"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such society can cohere only if its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible seek to avoid putting believers to extremely painful and intensely

burdensome choices of either being true to their faith or else respectful of the law."

To continue with the narration of the summary of the relevant law in this case, Article 28 of the Constitution of Zambia empowers the Court to grant redress to any person who proved to it that any of the provisions of Article 11 to 26 inclusive "has being, is being or is likely to be contravened"in relation to such person (see *Kachasu v Attorney General* (supra) at page 160). Article 28(1) has no application to proposed legislation of any kind; far less to a proposal to amend Chapter III itself. Article 28(1) applies to executive or administrative actions. Exceptionally, it may apply to a private individual or entity. Thus if there is on the statute book an Act of Parliament, or subsidiary legislation, which it is alleged contravenes the Constitution, it is not open to any individual to come to Court, and ask for a declaration to that effect. Before an individual has *locus standi* to seek redress, there must be an actual or threatened action in relation to him (see *Nkumbula v Attorney General* (supra) at page 214).

The opening words of Article 19 of the Constitution provide that:
"Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience..." These words have been construed to mean that an applicant has to satisfy the Court that without his or her own consent; he or she either has been, or is being, or is likely to be hindered in the enjoyment of his or her freedom of conscience. The operative wordis "hindered". Even a slight degree of hindrance, therefore, will be relevant, and may constitute a contravention of Article 19. And the onus is on the applicant to prove that he or she has been so hindered (see *Kachasu v Attorney General* (supra) at page 162).

APPLICATION OF THE LAW TO THE FACTS

I will now pass to apply the law to the facts of this case. There are two questions that fall to be determined in this matter. The first question is whether or not the respondent has and willfully continues to contravene the petitioners right of freedom of conscience as provided for in Article 19

of the Constitution. The second is whether the respondent willfully continues to contravene the petitioners fundamental right of protection from discrimination on the ground of creed as provided for in Article 23 of the Constitution.

PROTECTION OF FREEDOM OF CONSCIENCE

In the case of *Mahtani and others v Attorney General and others 2010/HP/872*, I observed at page 115 of the Ruling that:

"Article 28(1) of the Constitution is in my opinion broadly and generously formulated in order to enhance the protection of fundamental rights and freedoms. The broad limits of Article 28(1) further, in my opinion, allow for the grant of just, appropriate, and effective remedies to secure the protection of these rights and freedoms. Article 28(1) is therefore not only the entry point for the protection of fundamental rights and freedoms, but is also the bedrock of these rights and freedoms."

Thus Article 28(1) empowers the Court to grant redress to any person who proves to it that any of the provisions of Article 11 to 26 inclusive, "has been, is being, or is likely to be contravened." In so far as the protection of freedom of conscience is concerned, the opening words of Article 19(1) provide that: "Except with his own consent a person shall not be hindered in the enjoyment of his freedom of conscience." (The underlying is my own and is for emphasis sake). Therefore, the key or operative word in the context of Article 19(1) is the word "hindered".

The Longman Dictionary of Contemporary English, New Edition, for Advanced Learners, (Essex, Pearson Education Limited, 2009) defines the word "hindrance' as:

"1 Something or someone who makes it difficult for you to do something. 2. The act of making it difficult for someone to do something."

The Macmillan English Dictionary for Advanced Learners New Edition (Oxford, Macmillan Publishers Limited, 2007) defines the word "hindrance" *"as something that delays or prevents progress."*

The Oxford Paperback Thesaurus, Third Edition, (Oxford, Oxford University Press, 2006) defines hindrance as: impediment, obstacle, barrier, bar obstruction, hardship, block, hurdle, restraint, restriction, limitation,

encumbrance, complication, delay, drawback, setback, difficulty, inconvenience, snag, catch, hitch, or stumbling block".

Whilst the words inconvenience, snag, hitch, setback, or drawback may suggest or refer to a temporary phenomenon, the word hindrance in the context of Article 19(1) of the Constitution seems to me to suggest or mean an impediment, obstacle, barrier, bar, obstruction, restraint, restriction, limitation, or encumbrance that tends to abrogate fundamental rights and freedoms that would require judicial intervention and redress.

I, therefore accept MrSimeza's submission that hindrance being the antithesis of freedom of conscience, an infringement by the respondent cannot be established without showing to the Court that the petitioner's exercise of the freedom was affected by some constraint, restriction, or form of coercion which he was subjected to by the respondent. That is, a positive act or overt act or threatened action on the part of the respondent iskey to actionable infringement.

Under this segment of the petitioner's claim, there are two sub issues that fall to be determined. First, whether there has been some positive act or threatened action by the respondent.And the second, whether the act in question or threat has hindered the petitioner from the enjoyment of the freedom of conscience.It will be recalled that in his submissions, MrSimeza invited me to take judicial notice of the fact that the respondent has been in existence since 1965. Therefore, the practice of the respondent transacting business on Saturdays is preceded by the petitioner's conversion to Adventism; his admission to the bar; and eventual enrolment as a member of the respondent in 1996. I accept this invitation.

I further accept the submissions and arguments by MrSimeza as follows: first, that the petitioner has not proved that there has been any positive act taken or threat made by the respondent in the sense explained by Baron, JP, in the *Nkumbula* case (supra), or that the petitioner has been

placed in a situation where he has to make extremely painful and intensely burdensome choices of either being true to his faith, or else risk forfeiting his practice of the law, and his actual membership with the respondent, in the sense of *Sherbert v Vernar* (supra).Furthermore, as a matter of fact, the petitioner has not been denied his freedom of conscience; heis free to practice his religious beliefs as he pleases.Second, there is equally no evidence to show that any sanction(s) have been meted out or threatened against the petitioner by the respondent as a result of him professing Adventist beliefs, or indeed for his inability to attend the respondent's AGM. Mercifully, the respondent does not even penalise or in any way disadvantage any of its members who do not attend its AGM's. Thus the petitioner has been free to profess and practice his SDA faith without any hindrance whatsoever from the respondent.

I also accept the submission by MrSimeza, that the petitioner appears to be belabouring under a misapprehension of the spirit and purpose of Article 19(1) of the Constitution;although the holding of the AGM by the respondent on Saturdays may not be convenient to the petitioner, the respondent has certainly not hindered - in the sense defined above - the petitioner in the enjoyment of his freedom of conscience. The net result is therefore that this limb of the petitioner's claim is dismissed.

PROTECTION FROM DISCRIMINATION ON THE GROUND OF CREED

Under the second limb of the petitioner's claim, MrHangandu submitted that the respondent willfully continues to contravene his fundamental freedom from discrimination because of his religious creed as provided for in Article 23(1) of the Constitution. The basis of this claim is that by custom, the respondent convenes its AGM and several of its official programmes on Sabbath; notwithstanding his formal complaint as a*bona fide* member of the respondent. MrHangandu maintained that the timing of such meetings and programmes, unfairly hinders him from participating in the affairs or activities of the respondent because the Holy Sabbath falls during the same period.

It is instructive to recapitulate the terms of Article 23 (3),and the definition of the word “discriminatory”. It means:

“…affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject to or are accorded privileges or advantages which are not accorded to persons of another such description.”

In light of the definition “discriminatory” referred to above, I accept the submissions and arguments by MrSimeza as follows: first, that under this limb of his claim,the petitioner ought to have adduced evidence to show how he has been treated differently by the respondent. No such evidence was adduced. And there is also no evidence on record to show or suggest that the respondent schedules the meetings to suit the religious beliefs or opinions of any particular religious group over another. Or alternativelyput, there is no evidence to show that the decision by the respondent to hold its AGM on Saturday was deliberately or subtly arrived atin order to force, or influence the petitioner, and any like members, to stay away from SDA, or not to profess their religious beliefs against their will.

Second, in the absence of evidence that a similarly circumstanced or situated member(s) of the respondent complained about the day of holding of meetings, and that their complaint received more favourable treatment than that of the petitioner, there can be no proper or fair basis upon to found the allegation of discrimination; because discrimination is founded on the premise that different persons are accorded different privileges or advantages, which are not accorded to persons of another description.

Third, the relief sought by the petitioner would in factamount to sanctioning discrimination in favour of the petitioner, and against the respondent’s non-SDA members; in that activities and meetings would be

held on any day other than that which SDA members consider to be reserved for non-secular activities.

The net result is that the second limb of the petitioner's claim is also dismissed. Overall, I dismiss the entire petition.

I have no doubt in my mind that this petition has raised interesting, controversial, unprecedented, and above all, constitutional issues of high importance in our jurisdiction. And the settled practice of our Courts in cases of this nature, is to depart from the time honoured rule that costs follow the event. In the circumstances, I order that each party will bear its own costs.

Leave to appeal is also granted.

DR. P. MATIBINI, SC.
HIGH COURT JUDGE