KACHASU v ATTORNEY-GENERAL (1967) ZR 145 (HC)
HIGH COURT
BLAGDEN J

10th NOVEMBER 1967
Flynote and Headnote

[1] Courts - High Court - Jurisdiction - Validity of legislation under section 28 of the Constitution.
The High Court has no jurisdiction under section 28 of the Constitution to make any order where the complaint merely states that a regulation is invalid or that something done under it is unlawful because of a conflict with the provisions of the Constitution.

[2] Courts - High Court - Jurisdiction - Validity of legislation under section 28 of the Constitution.
For the purpose of exercising jurisdiction under section 28 of the Constitution, the High Court may determine the validity, effect and application of legislation, where the complaint is that a breach of the protective provisions of the Constitution has been brought about in part by that legislation or anything done under it.

[3] Constitutional law - Section 28 of the Constitution - Jurisdiction of the High Court.
See [1] and [2] above.

[4] Jurisprudence - Duty to obey valid law - Conscientious objection or religious scruples.
If a duty is imposed by a valid law and the breach of that duty is made subject to certain consequences, a person who is charged with such breach cannot set up as a defence that he has a conscientious objection or religious scruple against performing that duty.

[5] Education - Subject of instruction - Section 12 of the Education Act, 1966, and regulation 25 of the Education (Primary and Secondary Schools) Regulations, 1966, construed.
The provisions of Regulation 25 (1) (a) of the Education (Primary and Secondary Schools) Regulations, 1966, as to the singing of the National Anthem and the manner in which pupils should behave on occasions when the national flag is flown are provisions for a "subject of instruction" within the meaning of section 12 (1) of the Education Act, 1966.

[6] Education - Religious beliefs of pupils - Sections 24 and 25 of the Education Act, 1966, and regulation 31 (1) (d) of the Education (Primary and Secondary Schools) Regulations, 1966, construed.
There is no conflict between regulation 31 (1) (d) and the provisions of sections 24 and 25 of the Education Act, 1966.

[7] Education - Refusal of admission - The Education Act, 1966, section 24 construed - What constitutes refusal to admit a pupil on the grounds of religion.
Refusal to readmit a student because she failed to take part in ceremonies involving the worship of the national flag or the singing of the national anthem did not constitute refusal to admit a student on the grounds of religion and, thus, did not violate section 24 of the Education Act, 1966.

[8] Education - Religious ceremony or observance - The Education Act, 1966 - Section 25 construed - Nature of the test to be used to determine whether a ceremony is religious in nature.
Although a subjective test may be used in determining whether one holds a religious opinion, an objective test must be used in determining whether a ceremony or observance is religious in nature.

[9] Education - Religious ceremony or observance - The Education Act, 1966, section 25 construed - Meaning of the phrase "religious ceremony or observance".
On the basis of an objective test, the singing of the national anthem and the saluting of the national flag are not religious ceremonies or observances.

[10] Constitutional law - Freedom of conscience - What constitutes a religious ceremony or observance.
See [8] and [9] above.

[11] Courts - High Court - Jurisdiction - Redress under section 28 of the Constitution.
In order for the High Court to grant redress under section 28 of the Constitution, the applicant must satisfy the court that he has been, or is being, or is likely to be hindered in the enjoyment of his fundamental rights and freedoms without his consent.

[12] Constitutional law - Section 28 of the Constitution - Jurisdiction of the High Court.
See [11] above.

[13] Constitutional law - Freedom of conscience - Type of action necessary to constitute a contravention of section 21 of the Constitution.
There may be a breach of a person's right to freedom of conscience if there is even a slight degree of hindrance in his enjoyment of freedom of conscience or religious thought.

[14] Constitutional law - Freedom of conscience - Hindrance of enjoyment of freedom of conscience - Section 21 of the Constitution construed.
A person is hindered in the enjoyment of his freedom of conscience by being put under coercion to sing the national anthem against her religious beliefs, and by being suspended from any Government or aided school because of her refusal, on religious grounds, to sing the national anthem or salute the national flag.

[15] Evidence - Presumptions - Constitutionality of ministerial rules.
The presumption that the Legislature has acted constitutionally, and that the laws which it has passed are necessary and reasonable, extends to rules made by a minister under statutory powers conferred on him by the Legislature.

[16] Evidence - Burden of proof - Applicability of section 21 (5) of the Constitution.
The applicant, under section 28 of the Constitution, has the burden of proving that a challenged regulation is not saved by any of the provisions of section 21 (5) or that the challenged regulation is not reasonably justifiable in a democratic society.

[17] Constitutional law - Section 28 of the Constitution - Applicant's burden of proof.
See [16] above.

[18] Constitutional law - Freedom of conscience - Meaning of "reasonably required in interests of republic defence and public safety or to protect the rights and freedoms of others" in section 21 (5) of the Constitution.
A regulation requiring children in Government schools to sing the national anthem and to salute the national flag is reasonably required in the interests of defence, public safety and for the purpose of protecting the rights and freedoms of others.

[19] Constitutional law - Chapter III - Savings clauses - Weight of legislative opinion.
In determining whether a law or regulation is reasonably required in the interests of defence, public safety, public order, public morality, public health or for the purpose of

protecting the rights and freedoms of other persons, the High Court must give due weight to the opinion of the Legislature as expressed in the legislation.

[20] Constitutional law - Freedom of conscience - meaning of "reasonably justifiable in a democratic society" in section 21 (5) of the Constitution.
A regulation requiring pupils in Government schools to sing the national anthem and to salute the national flag, and a regulation giving the head of a school the power to suspend for failure to do so, are both reasonably justifiable in a democratic society.

Cases cited:
(1) *Minersville School Dist. v Gobitis,* 310 US 586 (1940).

(2) *R v Downes* (1875) 1 QBD 25.

(3) *R v Senior* [1899] 1 QB 283.

(4) *Baxter v Langley* (1869) 38 LJ (MC) 1.

(5) *Zavilla v Masse,* 112 Colorado 183 (1944).

(6) *Sheldon v Fannin,* 221 F. Supp. 766 (1963).

(7) *W Va State Bd of Edu. v Barnette,* 319 US 624 (1943).

(8) *Donald v Bd of Educ. of the City of Hamilton,* 1945 Ontario 518.

(9) *New York v Sandstrom,* 279 NY 523 (1939).

(10) *Adegbenro v Akintola* [1963] AC 614.

(11) *Arzika v Gov. N Region* (1961) All NLR 379.

(12) *Cheranci v Cheranci* (1960) NRLR 24.

(13) *DPP v Obi* (1961) All NLR 186.

Statutes and regulations construed:
Constitution of Zambia (Chapter III), ss. 13, 21 and 28.
The Education (Primary and Secondary Schools) Regulations, 1966, reg 25 and 31 (1) (d).
The Education Act, 1966 (No. 28 of 1966), ss. 12 (1) (6), 24 and 25.
Smith Q C, and Platt, for the applicant
Skinner, Att - Gen and O'Grady, State Advocate, for the respondent

Judgment
Blagden CJ: This is an application brought by Feliya Kachasu, a young girl aged between eleven and twelve years (whom I shall continue to refer to as "the applicant"), suing through her father, Paul Kachasu, as next friend, asking the High Court for an order against the State. The Attorney-General appears as respondent to the application in accordance with the provisions of the State Proceedings Act, 1965, section 12 (1).
The application is brought by way of originating notice of motion and although not so directly expressed it is an application for redress under section 28 of the Constitution. This section relates to the enforcement of the provisions of sections 13 to 26 (inclusive) of the Constitution - usually known as the protective provisions - which guarantee the protection of the fundamental rights and freedoms of the individual.
Omitting provisions and words not relevant to the instant application, section 28 of the Constitution reads as follows:

"28. (1) . . . if any person alleges that, any of the provisions of sections 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 may 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; . . .

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."

I should perhaps point out that subsection (7) of section 28 gives authority for the making of rules to regulate the practice and procedure in respect of proceedings under section 28. None have so far been made. In their absence High Court Rules, Order 7, rule 1 (c) applies, which provides that:

"Any application to be made to the Court in respect of which no special procedure has been provided by any law or by these rules shall be commenced by an originating notice of motion."

This is the procedure that has been adopted here. At the start of the trial, after hearing argument, I allowed Mr Richmond Smith to amend his originating notice of motion. The Attorney-General raised certain jurisdictional objections to the originating notice of motion in its amended form - objections which would have also applied to the notice in its original form. I shall revert to these objections later in my judgment.

To appreciate the nature of the relief which the applicant is seeking, it is necessary first to consider the facts. These are simple and substantially not in dispute.

Paul Kachasu, the applicant's father and next friend, is a Jehovah's Witness and has been such for a number of years. In 1961 he was appointed a congregation overseer. The applicant herself has been brought up in the religion of Jehovah's Witnesses and she has been taught that it is against God's law to worship idols or to sing songs of praise or hymns to other than Jehovah God Himself. She and her father and many other Jehovah's Witnesses regard the singing of the national anthem as the singing of a hymn or prayer to someone other than Jehovah God Himself; they also regard the saluting of the national flag as worshipping an idol. To them the singing of the national anthem and the saluting of the national flag are religious ceremonies or observances in which they cannot actively take part, because these ceremonies are in conflict with their own religious views and beliefs.

Let me make it clear at this point that the State does not challenge the sincerity of these views and beliefs. It is fully accepted that the applicant and her father and other Jehovah's Witnesses sincerely and genuinely believe that the singing of the national anthem and the saluting of the national flag are religious ceremonies or observances and that it is contrary to their religion for them to take active part in them. Likewise, there is no suggestion in this case of Jehovah's Witnesses intending any disrespect to the national anthem or the national flag by their actions.

The applicant has been schooling, without any complaints as to her conduct, since 1963 up to the time of the events which have given rise to these proceedings. On the 2nd September, 1966, there was brought into force The Education (Primary and Secondary Schools) Regulations, 1966. In this judgment I shall continue to refer to these regulations as "the Regulations"; and when I refer to a regulation by its number only it will be to that numbered regulation of the Regulations.

The Regulations apply only to Government or aided schools at which primary or secondary education is provided (see regulation 3 (1)). By regulation 25, pupils at these schools are required to sing the national anthem and salute the national flag on certain occasions. By regulation 31 (1) (d), the head of a school is empowered to suspend from attendance at the school any pupil who wilfully refuses 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 the school. There followed some interviews between the applicant's father and the school authorities, in the course of which the father endeavoured 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. He asked for her to be reinstated at the school and to be excused from singing the national anthem or saluting the national flag. It was made clear to him, however, that the applicant could not be readmitted 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. She has not attended school since.

By her notice of motion, the applicant is now asking the court to say that her suspension was unlawful, and that she is entitled to readmission to the school without having to give any undertaking that she will sing the national anthem or salute the national flag.
The notice also sets out the grounds on which the applicant bases her claim. The full text of the notice is as follows:

"TAKE NOTICE that the High Court of Zambia will be moved at Lusaka on Wednesday the 4th day of October, 1967 at 9 o'clock in the forenoon or so soon thereafter as Counsel for the above mentioned Applicant can be heard for an ORDER that:

(1) The suspension of Feliya Kachasu from Buyantanshi School, Mufulira in the Republic of Zambia on the 31st day of October 1966 and continuing to the date hereof is unlawful and that the said Feliya Kachasu is lawfully entitled to return to Buyantanshi School, Mufulira aforesaid at the soonest possible date hereafter without any let or hindrance and be excused on religious grounds from saluting the Zambian National Flag and from singing the Zambian National Anthem.

ON THE GROUNDS THAT:

(a) The said suspension constitutes a hindrance in the enjoyment of her freedom of conscience, which includes freedom of thought and of religion as provided in Chapter III of the Constitution of Zambia.

(b) Regulation 25 of the Education (Primary and Secondary Schools) Regulations 1966 is *invalid, null and void* because

(i) it is *ultra vires* Section 12 of the Education Act 1966 in that the content thereof does not bring it within the scope of any of the specified *objects or purposes* set out in Section 12 of the Education Act, 1966 for the purposes of which the Minister may make such regulations

(ii) *It is in conflict with* Section 21 of the Constitution

(c) *Regulation* 31 (1) (d) *of the Education (Primary and Secondary Schools) Regulations is invalid in that it is IN CONFLICT with Part VI Section* 24 *and* 25 *of the Education Act* 1966 *and Section* 21 *of the Constitution.*

(d) For the purposes of Section 21 of the Constitution the test as to what constitutes a religious ceremony observance or instruction is a subjective test and not an objective test.

AND FOR SUCH FURTHER Orders and Directions as this Honourable Court may consider appropriate."

In the American case of *Minersville School Dist. v Gobitis* [1], which concerned the refusal of two Jehovah's Witness pupils to participate in the flag salute ceremony at their school, Frankfurter, J, opened his judgment with the following words:

"A grave responsibility confronts this Court whenever in 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 nation's fellowship, judicial conscience is put to its severest test . . ."

That's very much the situation before me here.
It will be seen that the applicant's case raises two main issues. I state them in the order in which they are introduced by the originating notice of motion.
The first main issue is what I will call the constitutional issue. The applicant claims that her suspension from school and, it would follow the refusal of her application for unconditional readmission thereto, constitute a hindrance in the enjoyment of her right to freedom of conscience thought, and religion, guaranteed to her by sections 13 and 21 of the Constitution. Further, she claims that the regulations under which she came to be suspended - that is, regulations 25 and 31 (1) (d) - are themselves in conflict with section 21 of the Constitution, and consequently invalid.
The second main issue I shall describe as the legislative issue. The applicant's case here quite simply is that regulations 25 and 31 (1) (d) are invalid because they are in conflict with the Education Act, 1966, under which they were made.
I propose to deal with the legislative issue first. It is in this field that the jurisdictional objections raised by the Attorney-General upon Mr Richmond Smith's application to amend the originating notice of motion are relevant.
[1] [2] [3] The Attorney-General put his objections in this way: accepting that this application is an application to the High Court for redress under the special jurisdiction conferred upon it by section 28 of the Constitution, then the court is strictly limited to the jurisdiction so conferred. I have already quoted the relevant words of section 28. Briefly, the jurisdiction is to hear and determine any application alleging breach of the protective

provisions and to make whatever orders are appropriate for the enforcement of those provisions. The Attorney-General pointed out that the section also specifically preserved the subject's right to pursue other remedies lawfully available to him; and he submitted that the court had no jurisdiction under section 28 of the Constitution to make any order where the complaint was simply that a regulation was invalid or something done under it was unlawful because of a conflict not with the protective provisions, but with the provision of some Act. I agree. Section 28 confers a special jurisdiction; and the court must not stray outside it. But, for the purposes of exercising that jurisdiction it may, and indeed in most cases it will, be necessary to determine the validity, effect and application of legislation, where the complaint is, as here, that a breach of the protective provisions has been brought about in part by that legislation or anything done under it. Moreover, the State itself relies on the relevant legislation here - namely, regulations 25 and 31 (1) (d) - as justifying what was done in this case.

I found against the Attorney-General's objections to the form of the amended notice of motion but I left open for further argument, if necessary, the question as to whether the court had jurisdiction to grant the applicant any, and if so what, relief on her application, if it transpired that her suspension or exclusion from school was unlawful for reasons other than that there had been a contravention of any of the protective provisions. In the event no further argument on this question is required.

[4] So much for the jurisdictional objections. I pass on now to the substance of the legislative issue. At the outset I would like to introduce a glimpse of what may be obvious but which none the less may easily be overlooked. If a duty is imposed by a valid law and the breach of that duty is made punishable or subject to certain consequences, a person who is charged with such breach cannot set up as a defence that he has a conscientious objection or religious scruples against performing that duty (see *R v Downes* [2]*; R v Senior* [3]).

Here, however, the applicant attacks the validity of both regulation 25 and regulation 31 (1) (d), albeit for different reasons. I have already referred to these regulations briefly. I must now consider them in some detail.

Regulation 25 reads as follows:

"25. (1) For the purpose of promoting national unity and a proper respect for the National Anthem and the National Flag as the secular symbols of national consciousness -

(a) Instruction shall be provided at all schools in the singing of the National Anthem and in the proper manner in which pupils should behave on formal occasions at which the National Anthem is played or sung or the National Flag is flown; and

(b) at all schools, pupils shall be required formally to sing the National Anthem and to salute the National Flag on such occasions as the Head may, subject to this regulation, determine.

(2) Whenever pupils are required in accordance with this regulation-

(a) formally to sing the National Anthem, the pupils shall sing the National Anthem while standing at attention;

(b) formally to salute the National Flag, the pupils shall raise the right hand to the temple with the open palm facing outwards while standing at attention.

(3) Subject to the provisions of sub-regulation (4), the Minister may give to the Head of a school such directions as he may consider necessary with respect to the occasions on which pupils attending the school shall be required to sing the National Anthem or salute the National Flag, and the Head shall comply with those directions.

(4) No pupil shall be required to sing the National Anthem or to salute the National Flag as part of any religious ceremony or observance."

On behalf of the applicant it is contended that this regulation is ultra vires the rule making provisions of the Education Act. The relevant provision is section 12 (1) (b) which, omitting words of no application to the instant case, reads as follows:

"12. (1) The Minister may make regulations -

(b) prescribing and regulating . . . the subjects of instruction to be provided...."

Mr Richmond Smith argued that regulation 25 did not prescribe any subject of instruction to be provided. All it did was to prescribe a drill.

[5] I do not agree. Regulation 25 (1) (a) clearly prescribes for the provision of a subject of instruction - namely, "the singing of the National Anthem and the proper manner in

which pupils should behave on formal occasions at which the National Anthem is played or sung or the National Flag is flown". That may not amount to a very extensive subject, but it is a subject, and an important one.

The regulation then goes on to prescribe the *occasions* when school pupils should sing the national anthem and salute the national flag (regulation 25 (1) (b)); and *see also* 25 (3); and then the *manner* in which they should sing the national anthem (regulation 25 (2) (a)) and the *manner* in which they should salute the national flag "regulation 25 (2) (b)). I agree that the manner so prescribed in each case takes the form of a drill. But instruction by the method of drill is not uncommon in schools; and the fact that some form of drill is prescribed or used does not prevent instruction from being instruction. Further, on this point I would accept Mr O'Grady's submission that the prescription of this drill falls within the minister's power to make rules "regulating" the subject of instruction which he has prescribed shall be provided.

I find accordingly that regulation 25 is *intra vires* the Minister.

I come now to the consideration of regulation 31 (1) (d). Regulation 31 is a disciplinary regulation and deals, *inter alia*, with the suspension of pupils from attendance at school. The provision which is attacked reads as follows:

"31. (1) Subject to the provisions of this regulation, the Head of a school may suspend from attendance at the school -

(d) any pupil who wilfully refuses to sing the National Anthem or to salute the National Flag when he is lawfully required to do so under these Regulations."

It is claimed on behalf of the applicant that regulation 31 (1) (d) is invalid, in that, to repeat the wording of the notice of motion, "it is in conflict with part VI, sections 24 and 25 of the Education Act and section 21 of the Constitution."

I shall deal with the alleged conflict with the Constitution when I come to consider the constitutional issue.

[6] Sections 24 and 25 of the Education Act, omitting words irrelevant to the facts of the instant case, are in the following terms:

"24. No pupil shall be refused admission to any school . . . on the grounds of his . . . religion.

25. If the parent of the pupil attending any school requests that he be excused from . . .taking part in or attending any religious ceremony or observance, then, until the request is withdrawn, the pupil shall be excused therefrom accordingly."

I can see no conflict between regulation 31 (1) (d) and these sections, nor was any real argument adduced in support of such a proposition.

The argument that was put forward, as I understand it, was that in view of the provisions of sections 24 and 25 of the Education Act and of what was done by the applicant's father to invoke them, the applicant's suspension from school or, at any rate, her continued suspension, was unlawful.

What the applicant's father did was to make representations to the school authorities against their action in suspending the applicant and when these failed he made an application by letter to the headmaster, for her reinstatement. In this letter he specifically invoked the provisions of sections 24 and 25 of the Education Act and asked for her reinstatement - to quote the actual words he used - "with the understanding that on religious grounds she will be exempted from taking part in ceremonies involving the worship of the National Flag or the singing of the National Prayer or Anthem." But the headmaster still declined to reinstate her.

[7] I do not think section 24 affords the applicant any assistance here. She was not refused readmission to the school because she was a Jehovah's Witness but because she had been suspended for wilful refusal to sing the national anthem and would not agree to do so or salute the national flag in the future. It is true that her attitude in this regard was dictated by her religion. But this, at best, only makes her religion a remote cause of her suspension and failure to achieve reinstatement - a *cause sine qua non* perhaps, but not the *cause causans,* the proximate cause, which is what must be looked at here. That cause was the applicant's breach, and indicated continued breach, of regulation 25.

[8] [10] Section 25 of the Education Act however, raises a different question. The applicant is undoubtedly entitled under the provisions of this section to be excused from participation

or attendance at any religious ceremony or observance if her father so requests. Her father has so requested in relation to the ceremonies of singing the national anthem and saluting the national flag.
This brings me to one of the key questions of the whole case: is either the singing of the national anthem or the saluting of the national flag a religious ceremony or observance? This question the court must answer.
I have given consideration to the meaning of the words "ceremony" and "observance". I think that in the context in which these terms are used here "ceremony" connotes some continuity of performance, while "observance" relates more to a specific act. I do not think, however, that the difference is of any significance in the instant case. Both the singing of the National Anthem and the saluting of the National Flag could be regarded either as ceremonies or as observances. For convenience I shall continue to refer to them as ceremonies.
What test should be applied to these two ceremonies to determine whether they are religious or not?
I have been referred to a number of authorities and I would like to consider some of these briefly. The oldest is *Baxter v Langley* [4], where the question was whether a meeting, which was being held on certain premises on a Sunday, constituted an "entertainment or amusement", in which case it contravened the provisions of the Sunday Observance Act, 1780; or whether, as was contended for by the defence, it was a meeting for religious worship. There was some difference of opinion between Mr Richmond Smith and the Attorney-General as to whether the Court of Common Pleas in this case had applied a subjective or an objective test, but I am satisfied that the court resolved the issue on an objective test. It looked at what was done in this particular hall on the Sunday in question. taking into account the expressed intent of the defendant in holding the meeting, and came to the conclusion that the meeting did not fall under the heading of "entertainment or amusement".
Again, *Zavilla v Masse* [5] was cited by both the applicant and the State on this issue. This was a flag salute case involving Jehovah's Witnesses. Headnote 6 to the report reads:

"A religious belief is purely subjective. Pupils may not rightfully be expelled from school for their refusal to pledge allegiance to the United States Flag and take part in patriotic exercises, where they entertain the opinion that such acts would be in violation of their religious beliefs, and courts may not by judicial pronouncement, determine that the beliefs so entertained are not religious opinions."

There is a passage in the judgment of the court delivered by Chief Justice Young on pages 190 - 191, which suggests, however, that the court looked at the actual flag salute ceremony itself objectively. Young, C.J., said:

"Plaintiffs, as we understand their position, do not assert, arbitrarily or otherwise, that the saluting of the flag is a religious ceremony. We assume that the salute is enjoined, as counsel for the board state, 'for the purpose of engendering in the youthful mind, a love of country, respect for its institutions and for constituted authority.' We think this is its purpose; that the rule was adopted as a method or means to teach patriotism and that it is, and can have, no other purpose in a school curriculum."

In *Sheldon v Fannin* [6], the court clearly adopted an objective test in regard to the singing of the national anthem. Mathes, District Judge, delivering the judgment of the United States District Court for the District of Arizona, said (at page 13 of the photostat copy):

". . . the case at bar involves refusal to participate in a public school classroom ceremony.... the plaintiffs first argue that the National Anthem contains words of prayer, adoration and reverence for the Deity, and that a state's prescription of participation therein amounts to a prohibited 'establishment of religion'. This contention must be rejected. The singing of the National Anthem is not a religious but a patriotic ceremony intended to inspire devotion to and love of a country. Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation."

The court, however, went on to decide the case in favour of the pupils, relying, primarily on the leading U.S. Supreme Court decision of the
W. Va. State Bd. of Educ. v Barnette [7]. Mathes, J., said (at page 14 of the photostat copy):

". . . all who live under the protection of our Flag are free to believe whatever they may choose to believe and to express that belief, within the limits of free expression no matter how unfounded or even ludicrous the professed belief may seem to others. While implicitly demanding that all freedom of expression be exercised reasonably under the circumstances the Constitution fortunately does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible. The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based on religious belief and the sincerity or reasonableness of this claim may not be examined by this or any other court. Accepting, then, the plaintiffs' characterisation of this conduct as religiously inspired, this case is ruled by the W. Va. State Bd. of *Educ. v Barnette*, 319 U.S. 624 (1943), where the Supreme Court held unconstitutional the expulsion of Jehovah's Witnesses from a public school for refusal to recite the Pledge of Allegiance to the Flag."

In support of his submission that the subjective test was the proper one to be applied, Mr Richmond Smith cited *Zavilla* [5], to which I have already referred, where the court held that a religious opinion is purely subjective. Mr Richmond Smith also cited the case of *Donald v Bd. of Educ. of the City of Hamilton* [8]. a Canadian decision. This was another case of Jehovah's Witness pupils who refused on religious principles to sing God Save the King, or to repeat the Pledge of Allegiance or to salute the flag. The situation in this case was in many respects very similar to that of the instant case. The regulations required the singing of the national anthem as part of the daily opening or closing exercises. At the same time there was also a legislative provision that no pupil should be required to take part in any religious exercises objected to by his parent or guardian. The pupils and their parents in this case urged that, to them, both the flag salute and the singing of the national anthem were religious exercises to which they objected by reason of their religious beliefs. Gillanders, JA, delivering the judgment of the court, said at page 528:

"If I were permitted to be guided by my personal views, I would find it difficult, to understand how any well disposed person could offer objection to joining in such a salute on religious or other grounds. To me, a command to join in the Flag salute or the singing of the National Anthem would be a command not to join in any enforced religious exercises, but, viewed in proper perspective, to join in an act of respect for a contrary principle, that is, to pay respect to a nation and country which stands for religious freedom and the principle that people may worship as they please, or not at all."

Gillanders, JA, went on to say that it would be misleading to proceed on any personal views on what these exercises might include or exclude and he cited from the judgment of Lehman, J, in New *York v Sandstrom* [9]:

"There are many acts which are not acts of worship and which for most men have no religious significance and are entirely unrelated to the practice of any religious principles or tenet but which may involve a violation of an obligation which other men may think is imposed upon them by divine command or religious authority. To use a homely illustration, partaking of food is ordinarily in no sense 'any approach to a religious observance', it is purely mundane, with no religious significance, yet ordinances establishing fast days or prohibiting the use of certain kinds of food are a part of the religion of many people."

A little later in his judgment, Gillanders, JA, said (at page 530):

"The fact that the appellants conscientiously believe the views which they assert is not here in question. A considerable number of cases in other jurisdictions, in which the same attitude to the Flag Salute has been taken, indicates that at least the same view has been conscientiously held by others. The statute, while it absolves pupils from joining in exercises of devotion or religion to which they, or their parents, object, does not further define or specify what such exercises are or include or exclude. Had it done so, other considerations would apply. For the court to take to itself the right to say that the exercises here in question had no religious or devotional significance might well be for the court to deny that very religious freedom which the statute is intended to provide."

I do not think it is necessary for me to refer to any more cases on this issue although others were cited.

[9] [10] It is abundantly clear from these cases that where a religious opinion is in question a subjective test must be applied. Indeed, it is impossible to test something so personal as an opinion in any other way. But when the nature of a ceremony or observance is in question it seems to me that a subjective test is inappropriate and its application could lead to anomalous results. The ceremony itself must be looked at objectively, as it was in *Baxter v Langley* [4] and *Sheldon v Fannin* [6], to which I have already referred. This is not to say that the subjective views of those attending the ceremony are not to be taken into account. They will carry considerable weight; but they will not necessarily be decisive.

To take an objective view of the religious nature or otherwise of a ceremony or observance is not easy. A judge charged with this duty must be careful not to allow his own religious views to colour his judgment. In the present case, to determine objectively whether the ceremonies of singing the national anthem and saluting the national flag are religious ceremonies or not I have asked myself three questions:

(1) By whom were these ceremonies instituted and with what objects?

(2) In the manner in which they are conducted are they invested with any of the trappings of religious worships?

(3) Do the persons who attend these ceremonies regard them as religious?

My answers to these questions are as follows:

(1) These ceremonies are instituted on the directions of the State and not of any church or religious organisation. They form part of the instruction which is to be provided in Government schools in how to behave on formal occasions at which the national anthem is played or sung or the national flag flown; and their object, together with that instruction, is to promote national unity and proper respect for the national anthem and the national flag as the secular, not religious, symbols of national consciousness. Moreover, special provision has been made that no pupil shall be required to participate in these ceremonies as part of any religious ceremony or observance (see regulation 25 (4)).

(2) The ceremonies of singing the national anthem and saluting the national flag are not invested with the trappings of religious worship. They are not conducted by a priest, nor in a place of religious worship, nor is use made of any equipment or books associated with religious worship.

(3) Some persons - notably the applicant and her Jehovah's Witness colleagues - genuinely and sincerely regard these ceremonies as religious.

Applying the objective test through the medium of these questions and answers, I hold that, notwithstanding the views of the applicant and her colleagues, the singing of the national anthem and saluting of the national flag are not religious ceremonies or observances. It follows that the applicant's claim that she is entitled to be excused from singing the national anthem and saluting the national flag and in consequence reinstated at the school without the obligation to participate in those ceremonies, by reason of the provisions of section 25 of the Education Act, fails.

This concludes the determination of what I have called the legislative issue I have held that regulation 25 is not beyond the rule making powers conferred by section 12 of the Education Act and that neither regulation 31 (1) (d) nor the applicant's suspension under that provision are in conflict with sections 24 or 25 of the Education Act.

I come now to the consideration of what I have described as the constitutional issue in this case. I have already stated it in brief. I have been referred, in relation to this issue, to a number of cases from various parts of the world. I have derived considerable assistance from these authorities and I am indebted to counsel on both sides for their industry in locating them. But I have also borne in mind, as being particularly apt here, the words of Lord Raddcliffe in *Adegbenro v Akintola* [10], where he said, in relation to the study of decisions on the interpretation of the constitutions of other countries:

> ". . . it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be over - ridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulas that have been chosen as the frame of this Constitution."

[11] [12] Section 28 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 . . ." It amounts to this, then, that the applicant here has to satisfy the court that, without her own consent

she either has been, or is being, or is likely to be hindered in the enjoyment of her freedom of conscience.

The applicant's case on this issue is that her suspension and continued exclusion from school constitute such hindrance, and that the regulations under which she was suspended - that is, regulation 25 and 31 (1) (d) - are themselves in conflict with section 21 of the Constitution, and in consequence invalid.

The resolution of this whole hinges primarily on the issue of the validity or otherwise of regulation 25. Basically, regulations 25 and 31(1) (d) stand or fall together. Regulation 25 makes compulsory the singing of the national anthem and the saluting of the national flag in Government schools. If it is invalid, then regulation 31 (1) (d), which imposes the penalty of suspension on pupils who disobey, must be invalid too; and any order or suspension made under this regulation must of necessity be unlawful. On the other hand, if regulation 25 is valid then it is likely that so also is regulation 31(1)(d), and that any order of expulsion made properly and fairly under it will be lawful.

Section 21 of the Constitution is one of the protective provisions in Chapter III of the Constitution, to which I have already referred. The opening section of this chapter, section 13, reads:

> "Whereas every person in Zambia is entitled to the fundamental rights and freedoms of the individual, that is to say the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others, and for the public interest to each and all of the following, namely -
>
> (a) life, liberty, security of the person and the protection of the law;
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> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation:
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

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.
>
> (2) Except with his own consent (or, if he is a minor, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own."

I omit subsections (3) and (4) because they are of no relevance to the facts of the instant case. There follows subsection (5), which is of the greatest importance here:

> "(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required -
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> (a) in the interests of defence, public safety, public order, public morality or public health; or
>
> (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion;
>
> and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The language of these provisions may sound a trifle involved but the meaning and intent of them are clear. Subsections (1) and (2) - together with subsections (3) and (4) - introduce the right to freedom of conscience, thought and religion. That right is a fundamental one. But it is not absolute. It is subject to the *provisos* enacted by subsection (5). The effect of these *provisos* is to allow restraints on freedom of conscience when these

are imposed by a law which satisfies certain requirements, and when the restraints themselves are reasonably justifiable in a democratic society.

[13] 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.

The *onus* is clearly on the applicant to prove that she has been so hindered and I have no hesitation in holding that she has successfully discharged this burden.

The Attorney-General argued that there could be no hindrance here in that the applicant was not and is not compelled to attend any Government school. She elected to do so, or her father did on her behalf, and she was free to leave at any time. Her election, of course, was not an election to join a school where she knew she would be required to sing the national anthem and salute the national flag. It was at best an election to remain in a school after this requirement had been imposed.

[14] But in any case, in my view, the applicant was hindered in the enjoyment of her freedom of conscience 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 God Himself. Furthermore, I think she is also both being presently hindered and likely to be hindered in the future inasmuch as whilst she is free to enjoy her freedom of conscience in most of Zambia she is not so free on the premises of any Government or aided school to which she would ordinarily be entitled to admission; and she may anticipate that if she secures such admission she will be subject again to the same coercion which she has already experienced to act against her religious beliefs.

All this, to my mind, clearly constitutes hindrance, and it follows that the applicant is entitled to redress in respect thereof unless that hindrance and the law which sanctions it come within the ambit of subsection (5) of section 21.

Mr Richmond Smith submitted that once the applicant had succeeded in proving that she had been hindered in the enjoyment of her freedom of conscience, the *onus* of showing that the law which brought about that situation fell within the ambit of subsection (5), rested on the State.

[15] [16] [17] There is, however, a presumption that the Legislature has acted constitutionally and that the laws which it has passed are necessary and reasonably justifiable (see *Arzika v Gov. N Region* [11] per Bate, J at 382); and I think this presumption extends to rules made by a minister under statutory powers conferred on him by the Legislature. It is part of the applicant's case that regulation 26 is unconstitutional and invalid. The *onus* is on her to prove it, and as part of that *onus* she has to show that regulation 25 is not saved by any of the provisions of section 21 (5) of the Constitution (see *Cheranci v Cheranci* [12] (commented on in 1963 J.A.L. at pages 159 - 160)). Similarly, if the issue arises, it will be for her to show that "the thing done under the authority" of the regulations - that is to say, the coercion exercised on her, her suspension and her continued exclusion from school, or any one of them - is not reasonably justifiable in a democratic society.

I have already quoted the provisions of section 21 (5) in detail. To prove that subsection (5) does not save regulations 25 and 31 (1) (d) or, alternatively, anything done under them, from amounting to a contravention of section 21, the applicant has to establish one or other of a number of alternatives. I state these in relation only to the facts of the instant case and as simply as possible. The applicant must show, either -

(1) that regulation 25 or 31 (1) (d) goes beyond the extent of what is reasonably required in the interests of defence, public safety or public order, or for the purpose of protecting the rights and freedoms of others; or

(2) that regulation 25 or 31 (1) (d) goes further than is reasonably justifiable in a democratic society; or

(3) that any one of the hindrances she has suffered to her enjoyment of freedom of conscience - the coercion, the suspension and the exclusion - go further than is reasonably justifiable in a democratic society.

If the applicant succeeds in establishing any one of these alternatives then she succeeds in her case, for I have already held that she has been hindered in the enjoyment of her freedom of conscience.

Mr Richmond Smith submitted that a law which compels little children to sing the national anthem and salute the national flag in Government schools on pain of suspension cannot be said to be reasonably required in the interests of defence, public safety, public order or for the purposes of protecting the rights and freedoms of others. The purely passive actions of these children, he contended, in not actually singing the national anthem or saluting the national flag, but in other respects behaving with perfect propriety in regard to these national symbols cannot possibly imperil the State or the public or have any effect on other person's rights and freedoms, as they simply do not touch them. This is powerful argument and I have every sympathy with it.

[18] The Attorney-General's submission, in answer, was to say that regulation 25, and by implication regulation 31 (1) (d), is reasonably required both in the interests of public safety and for the purposes of protecting the rights and freedoms of others. He argued, further, that if regulation 25 is so reasonably required here in Zambia then it must surely follow that it is also a reasonably justifiable measure in a democratic society, because Zambia is a democratic society.

The Attorney-General put his argument this way: the applicant's undoubted right to enjoy freedom of conscience, and all the other rights and freedoms guaranteed by Chapter III of the Constitution, depend for their very existence and implementation upon the continuance of the organised political society - that is the ordered society - established by the Constitution. The continuance of that society itself depends upon national security, for without security any society is in danger of collapse or overthrow. National security is thus paramount not only in the interests of the State but also in the interests of each individual member of the State; and measures designed to achieve and maintain that security must come first; and, subject to the provisions of the Constitution, must over - ride, if need be, the interests of individuals and of minorities with which they conflict.

I fully accept the principle of these arguments. Indeed, the way in which section 21 (5) of the Constitution is framed is in accordance with it. Subsection (5) indicates that in the interests of the security of the State or of the general rights of the people, the individual's right to the unhindered enjoyment of freedom of conscience can be curtailed.

The next and most important stage in the Attorney-General's argument was to submit that to achieve and maintain national security it was essential to have national unity. "National unity", said Frankfurther, J, in *Gobitis*, [1] "is the basis of national security." I agree; and I would add this: if national unity is essential in a mature and established nation, how much more necessary is it in a newly emergent nation? I think this court can take judicial notice of the disruptive consequences of disunity where this has manifested itself in other newly emergent states on this continent. Zambia is a newly emergent state. I accept the unchallenged evidence in the affidavit sworn to by Mr Valentine Musakanya, the Secretary to the Cabinet, that there are some seventy - three tribes in Zambia. Further, that tribalism and sectionalism do constitute serious dangers to the unity and thus to the security of Zambia.

I also accept that to counteract these dangers there must be instilled in the nation a consciousness of national unity and national allegiance; and that in particular such a consciousness must be instilled in the minds of the young by proper and appropriate instruction. Regulation 25 is expressed to be designed to that end; the opening words are: "For the purpose of promoting national unity . . ." Along with - so far as I know - every other civilised country in the world, Zambia has adopted a national flag and a national anthem as symbols of her nationhood. These symbols must be acknowledged as such and treated with due respect; and it follows that in principle a law which makes proper provision therefor is one which is reasonably required in national interests and is reasonably justifiable in a democratic society.

I do not think that Jehovah's Witnesses are in disagreement with this principle. Their quarrel is not with the principle but the manner of implementing it. They say the law is unconstitutional: that it requires things to be done and imposes sanctions for not doing them, which are not reasonably required and are not reasonably justifiable.

The court has to decide these matters. Ordinarily, where a court is called upon to adjudicate on the effect of a legislative measure, it is concerned only with the validity of the measure, its meaning and its application. It is not concerned with its wisdom or even its reasonableness. These normally, are matters purely for the Legislature. But here, by reason of the provisions of sections 28 and 25 of the Constitution, the court is charged with determining reasonableness, and this task I must now fulfil in relation to regulations 25 and 31 (1) (d), and what has been done to the applicant under these regulations.

The first point I would make is the rather obvious one: that for a law to come within the ambit of subsection (5) of section 21 of the Constitution that law does not have to be necessarily required or even urgently required - it has only to be reasonably required.

[19] The second point I would make is that in approaching its task the court must give due weight to the opinion of the Legislature, as expressed in the legislation.

The court's proper approach in matters of this nature has been considered in a number of cases in other countries. The matter is well summarised in a Nigerian case - *D.P.P. V Obi* [13] - where Brett, F.J., said, at page 197:

> "There is one fact to which our attention was not drawn by counsel but which I do not feel able to ignore. The Constitution entrusts the courts with the task of deciding conclusively whether or not any legislative measure contravenes Chapter III of the Constitution, and I do not wish to say anything which might suggest that the courts are evading their responsibilities. Nevertheless, it is right that the courts should remember that their function is to decide whether a restriction is reasonably justifiable in a democratic society, not to impose their own views of what the law ought to be. In considering the correct judicial approach, the Supreme Court of India said, in *Madras v Row* (1952) SCR 597:
>
> ' In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment can only be dictated by their sense of responsibility and self - restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable'.
>
> In similar vein, Holmes, J, delivering the judgment of the Supreme Court of the United States in *Mo., Kan. and Texas R R v May* (1904) 194 U.S. 267, a case concerning the constitutional guarantee of the equal protection of the laws said:
>
> ' It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Courts'."

Now, in the light of all the foregoing, I ask myself, is it reasonably required in the interests of public safety, or for the purpose of protecting the rights and freedoms of others that children in Government schools should be required to sing the national anthem and salute the national flag? The criterion is reasonableness, not essentiality. A requirement can be reasonable without being essential.

The burden is on the applicant to show that the requirement is not reasonable, and I do not think she has discharged it.

Bearing in mind the compelling consideration; particularly at the present time, of national unity and national security, without which there can be no certainty of public safety nor guarantee of individual rights and freedoms, I think it is a reasonable requirement that pupils in Government and aided schools should sing the national anthem and salute the national flag. I certainly cannot see that it is unreasonable - which is substantially what the applicant has to prove; and if a thing is not unreasonable then surely it must be reasonable. There is little, if any, room for anything in between.

I should add that the position might well be different if the requirement to sing the national anthem and salute the national flag went outside Government and aided schools. Then it might not be reasonable. But the true position here is that the applicant is not compelled by the State to sing the national anthem or salute the national flag. She is only required to do so as a condition - along with other conditions - if she wishes to attend a Government or aided school, that is to say, if she chooses to accept education provided or financed by

the Government. This seems to me to be reasonable. She is not compelled to attend a Government school. Education is not compulsory in Zambia as it is in some other countries. Nor is the State under any mandate to provide education. It is true, as I understand it, that at present she can look to no other comparable source of education than Buyantanshi School because at present no other is available. But she is not, as a result denied freedom of religion. She is free to practise her religion as she pleases. It is not really her freedom of religion which is invaded; it is her freedom of education; but that is not a freedom which is guaranteed by the Constitution.

Is regulation 31 (1) (d), by itself, reasonably required in the interests of public safety or for the protection of the rights and freedoms of others? This poses the question, is it reasonable to visit the sanction of suspension from school on those who refuse to comply with regulation 25? Once it is accepted that regulation 25 itself is reasonably required I can think of no more appropriate way of ensuring compliance with it. If pupils are not prepared to obey reasonable Government school rules, then it must be a reasonable requirement that they should leave. Here again, it might be otherwise if the sanction imposed were, say, corporal punishment. The idea of chastising a child because it will not perform an act contrary to its religious conscience strikes me not only as unreasonable but as barbaric. But a sanction of suspension or exclusion seems to me the logical answer to refusal to comply with a reasonable school requirement.

[20] Are regulations 25 and 31 (1) (d) reasonably justifiable in a democratic society? Subsection (5) specifies "a democratic society". It does not specify Zambia. But it is accepted that Zambia is a democratic society. The criteria of what is justifiable in a democratic society might vary according to whether that society is long established or newly emergent. Zambia is newly emergent. It would be unrealistic to apply the criteria of a long - established democratic society. We should look to the democratic society that exists in Zambia; and having found that these regulations are reasonably required in Zambia I have no hesitation in finding that they are reasonably justifiable in the democratic society that exists here.

Finally, there is "the thing done under the authority" of these regulations. Here the applicant was coerced to sing the national anthem and when she declined to do so she was suspended from school and denied readmission. Were these actions reasonably justifiable in a democratic society? But I have really already answered this question when dealing with the reasonableness of the regulations which authorise the taking of these actions. In my view they are reasonably justifiable in the democratic society which exists here in Zambia.

To summarise my findings in relation to the relief claimed and the grounds therefor submitted in the originating notice of motion, I find that:

(1) Regulations 25 and 31 (1) (d) of the Education (Primary and Secondary Schools) Regulations, 1966, are valid and within the rule - making powers conferred by section 12 of the Education Act, 1966; further, that they do not conflict with any other provision of the Education Act, 1966, nor are they in conflict with section 21 of the Constitution.

(2) The applicant has suffered hindrance in the enjoyment of her freedom of conscience in that she has been coerced to sing the national anthem at Buyantanshi School contrary to her religious conscience; and that she has been suspended from school and denied readmission thereto in consequence of her refusing to sing the national anthem or salute the national flag.

(3) Such hindrance, however, does not constitute a contravention of her right to the enjoyment of freedom of conscience, secured to her by section 21 of the Constitution, inasmuch as that hindrance is reasonably justifiable in a democratic society and was authorised 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.

It follows that the applicant has not established that any of the provisions of sections 13 to 26 (inclusive) of the Constitution have been, are being, or are likely to be, contravened in relation to her, and that she is not entitled to any redress under section 28 of the Constitution. There must be judgment for the Attorney-General with costs.

Order accordingly.