REPORTABLE (19)

MATHEW SOGOLANI

v

(1) THE MINISTER OF PRIMARY AND SECONDARY EDUCATION
(2) THE HEADMASTER, MASHAMBANHAKA SECONDARY SCHOOL
(3 THE HEADMASTER, CHIZUNGU PRIMARY SCHOOL
(4) THE ATTORNEY-GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA DCJ, GARWE JCC, GOWORA JCC, HLATSHWAYO JCC, GUVAVA JCC, MAVANGIRA JCC, BHUNU JCC & UCHENA JCC
HARARE, FEBRUARY 1, 2017 & DECEMBER 28, 2020

D T Hofisi, for the applicant

L Uriri, for the respondents

MALABA CJ:

INTRODUCTION

This is an application made in terms of s 85(1)(a) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (“the Constitution”) for appropriate relief based on a freedom

of religion claim. The application raises questions of the constitutionality of the policy and the actions of the education authorities of compelling schoolchildren to salute the national flag and to say the words "Almighty God, in whose hands our future lies" in the process of reciting a pledge of allegiance to the country.

The first question is whether the policy and the actions of compelling the applicant's children, who hold a religious belief that saluting a flag is "worshipping a graven image" contrary to a fundamental doctrine of their faith, infringed their right to freedom of religion.

The second question is whether the policy and the actions of the education authorities of compelling the applicant's children to salute the national flag infringed the applicant's parental right to determine the upbringing of his children according to his religious belief.

The third question is whether the policy and the actions of the education authorities of compelling all schoolchildren, regardless of religious affiliation, to say the words "Almighty God, in whose hands our future lies" infringed the right to freedom of religion of children who do not belong to religions that embrace the belief in the existence of God or in the existence of a god at all.

The Court holds that the policy and the actions of the education authorities of compelling all schoolchildren, regardless of religious affiliation, to salute the national flag and to say the words "Almighty God, in whose hands our future lies" as part of the recitation of the schools' national pledge of allegiance ("the pledge") infringed the right to freedom of religion of the applicant's children, enshrined in s 60(1) of the Constitution; the applicant's parental right, enshrined in s 60(3) of the Constitution; and the right to freedom of religion of children who belong to faiths that do not embrace the belief in the existence of God or in the existence of a god at all, enshrined in s 60(1) of the Constitution.

The saluting of the national flag and the saying of the religious words in the pledge are not *per se* unconstitutional. They are made to be so by the effect of the compulsion on the schoolchildren.

The Court holds further that no justification which met the requirements of an acceptable limitation of a derogable fundamental right or freedom prescribed under s 86(2) of the Constitution was advanced by the respondents in respect of any of the cases of infringement of the fundamental rights concerned.

The detailed reasons for the decision of the Court now follow.

BACKGROUND FACTS

Some time in 2016 the first respondent introduced the pledge, which all schoolchildren were compelled to memorise and recite at assemblies every school day. There is no provision for exemption. The avowed primary purpose and objective of the pledge is the inculcation into schoolchildren of feelings of patriotism and other ethical precepts, such as honesty and dignity of hard work.

The primary objective pursued by the pledge is secular in nature. Included in the essential elements of the pledge as a means for the achievement of the secular objective are acts, the commission of which would have a direct effect on the religious beliefs of the reciters of the pledge. Compulsory recitation of the pledge in the current form by children at private and public infant, primary and secondary schools was the chosen means by which the governmental policy behind the pledge is enforced.

Two versions of the pledge were designed. There is the pledge for primary schools and secondary schools, and another for infant schools.

The pledge for secondary and primary schools reads as follows:

"Almighty God, in whose hands our future lies:

I salute the national flag

United in our diversity

By our common desire

For freedom, justice and equality

Respecting the brave fathers and mothers who lost lives in the *Chimurenga/Umvukela*

We are proud inheritors of the richness of our national resources

We are proud creators and participants in our vibrant traditions and cultures

I commit to honesty and dignity of hard work".

The formulation of the pledge for infant schools is as follows:

"Almighty God, in whose hands our future lies:

I salute the national flag

I commit to honesty and the dignity of hard work".

The applicant says he is a devout Christian, who is a member of the Apostolic Faith Mission ("AFM"). All the members of his family are members of the religious sect and hold and practise the religious beliefs of the sect.

On 15 May 2016 the applicant approached the Court alleging that the versions of the pledge as formulated violate his children's fundamental right to freedom of religion, in that they are compelled to salute the national flag contrary to their religious belief. The applicant and his children hold a belief that it is a compelling precept of their faith that a secular object must not be saluted. He also alleged that the compulsion on his children to salute the national flag violates his parental right to determine, in accordance with his religious belief, his children's moral and religious upbringing.

The applicant also alleged that by compelling all schoolchildren, regardless of religious persuasion, to say the words "Almighty God, in whose hands our future lies" in the recitation

of the pledge the first respondent violates the fundamental right to freedom of religion of the schoolchildren who do not share the religious belief embodied in the words.

The objection by the applicant to his children being forced to salute the national flag as being contrary to their religious belief is based on a literal interpretation of the "*Holy Scriptures*", particularly the book of *Exodus*. Chapter 20 verses 3-5 of the Book of *Exodus* is in these words:

> "3. You shall have no other gods before me.
>
> 4. You shall not make for yourself a graven image or any likeness of anything that is in heaven above, or that is in the earth beneath or that is in the water under the earth. …
>
> 5. You shall not bow down to them or serve them, for I the LORD Your God am a jealous God …".

Based on the literal interpretation of the above excerpt from the Bible, the applicant and his children hold the belief that worship must be reserved for God only. They believe that the national flag, as a secular object or symbol, is a graven image and that to salute it is to worship the flag. According to the applicant, being compelled to salute the national flag is to coerce his children to perform an act contrary to their religious belief. He argued, on account of his religious belief, that his conscience remains tormented and gives him no rest or peace when his children take part under compulsion in the recitation of the pledge in the current form, which includes pronouncement of the act of saluting the national flag.

The applicant, without desire to show disrespect for the national flag and the country, interprets the Bible as commanding, at the risk of God's displeasure, that his children must not go through the form of a pledge of allegiance that involves saluting a secular object such as a flag.

The significance of a symbol lies in what it represents. The applicant does not challenge what the national flag as a symbol represents. He challenges the constitutionality of the policy and the governmental action of compelling all schoolchildren, regardless of religious persuasion, to salute the national flag as part of the pledge of allegiance to the country. His objection to the use of compulsory recitation of the pledge to inculcate the virtues of patriotism and national identity in schoolchildren is notwithstanding the legitimacy of the secular objective pursued.

The applicant does not reject the national flag. He respects it. His case is that the use of the national flag as symbolism for the legitimate secular purpose does not have to take the form of a coerced salutation of the flag, which he says he genuinely believes is a form of worshipping of the flag.

The applicant's complaint is that the policy and the governmental action of compelling all schoolchildren to salute the national flag as a symbol for inculcating feelings of good citizenship infringe his children's right to freedom of religion enshrined in s 60(1) of the Constitution. The applicant argued that the community interest in ensuring that schoolchildren are imbued with the virtues of the value of patriotism or good citizenship would not be prejudiced by the protection of freedom of religion of the children.

The applicant alleged that the religious words "Almighty God, in whose hands our future lies", forming part of the pledge, embody a religious belief in the existence of God, who is a supernatural being with supreme power, capable of controlling and directing human life and entitled to reverence and obedience. The contention by the applicant was that the religious belief embodied in the words the schoolchildren are compelled to say in reciting the pledge is characteristic of monotheistic religions.

The applicant averred that the first respondent gave a State endorsement to monotheistic faiths. The applicant said the alleged conduct of the State infringes the right of freedom of religion of those schoolchildren who do not share the faith based on the belief in the existence of God. There are schoolchildren who believe in polytheism. He said the pledge also violates the freedom of religion of those schoolchildren whose religious beliefs do not recognise the existence of any form of a deity or supreme being or who are non-committal on the question of the existence of a higher being. In this regard, the applicant stated the following:

> "As such, the national pledge effectively casts those … with a contrary faith as outsiders. … This is because the State has formulated a pledge to be recited on matters, including religious matters. The mere recitation of the national pledge will thus amount to a repudiation of their religious values and, in essence, will amount to a public announcement that they do not belong to the political community. Concordantly, those … who do not share the faith as formulated in the pledge will be cast as unpatriotic even though they respect the culture and national heritage but only do not wish to do so in a religious context. This is needless and unnecessary exclusion, marginalisation which will effectively make them feel like second class citizens and is discriminatory on religious grounds."

The application was opposed by the first, the second and the third respondents ("the respondents"). The first respondent, who was responsible for the formulation of the policy which gave rise to the governmental action requiring the compulsory recitation of the pledge, deposed to the opposing affidavit. He admitted that the pledge as formulated forces a schoolchild at the time of its recitation to acknowledge the existence of "Almighty God" and to exalt Him as a supernatural being capable of controlling and directing human life and entitled to individual reverence and obedience. He averred that the applicant's objection to the pledge on religious grounds was misplaced because the pledge was not a prayer but simply "a pledge or commitment which begins by exalting 'Almighty God'". He said there was nothing wrong in acknowledging God at the beginning of the pledge. The first respondent said:

> "There is no other God that is acknowledged in the school pledge, neither does the school pledge demand worshipping or bowing to any other god … . The school pledge is part of appropriate education."

The respondents characterised the pledge as a "creed" which testifies to the religious, cultural and historical beliefs of the people of Zimbabwe. They contended that the pledge is necessary for nation-building. They averred that the pledge is a way of inculcating feelings of patriotism.

The respondents further averred that there was no endorsement of monotheism by the State. The contention was that the words "Almighty God, in whose hands our future lies" were of a ceremonial and patriotic nature. They did not constitute an attempt to officially promote a particular religious belief. Regarding the salutations pertaining to the national flag, the first respondent averred that the flag "is an important symbol of national unity and referring to it in the pledge is part of initiatives designed to promote knowledge of the institutions and symbols of the country".

The relief sought by the applicant was couched in the following terms:

> "WHEREUPON after reading papers filed of record and hearing Counsel,
>
> IT IS DECLARED THAT:
>
> 1. The policy requiring all children in schools to recite the national pledge as formulated is constitutionally invalid in that it violates the rights enshrined in sections 60(1) and 60(3) of the Constitution of Zimbabwe.
>
> CONSEQUENTLY, IT IS ORDERED THAT:
>
> 2. There shall be no recitation of the national pledge as formulated in any schools or by any schoolchildren in Zimbabwe.
>
> IN THE ALTERNATIVE:
>
> 3. The first respondent be and is hereby barred from compelling schools and all children in schools to recite the national pledge as formulated or requiring any punitive consequences on those that elect not to recite the pledge.

4. Consequently, the second and third respondents shall not compel schoolchildren, including the applicant's children, to recite the national pledge as formulated or require any punitive consequences on those that elect not to recite the pledge.

5. The first respondent to pay the costs of this application."

It is important to note that the pledge in the current form met with criticism from parents and religious groups on the ground that it was an attack on religious freedom. The recitation of the pledge was suspended by the education authorities pending the decision of the Court on the application.

RIGHT TO FREEDOM OF CONSCIENCE

Section 60 of the Constitution contains the right to freedom of conscience. It provides as follows:

"**60 Freedom of conscience**

(1) Every person has the right to freedom of conscience, which includes —

(a) freedom of thought, opinion, religion or belief; and

(b) freedom to practise and propagate and give expression to their thought, opinion, religion or belief, whether in public or in private and whether alone or together with others.

(2) No person may be compelled to take an oath that is contrary to their religion or belief or to take an oath in a manner that is contrary to their religion or belief.

(3) Parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare.

(4) Any religious community may establish institutions where religious instruction may be given, even if the institution receives a subsidy or other financial assistance from the State."

INTERPRETATION OF SUBSECTIONS (1) AND (3) OF SECTION 60 OF THE CONSTITUTION

Subsection (1) of Section 60: Freedom of Religion

The fundamental right to freedom of conscience as asserted by the applicant is of vital importance in an open and democratic society. It is essentially the seal of a free society based on human dignity and equality. A person's ability to formulate beliefs and express them is central to social stability, and his or her growth and self-worth. The importance of the right to freedom of religion is not only shown by the constitutional guarantee. It is also shown by the fact that almost all international human rights instruments require States Parties who subscribe to them to guarantee the right to freedom of religion as an aspect of freedom of conscience.

The special treatment of religion and the protection of matters of belief and practice related to it under the rubric of freedom of conscience arise from the fact that they deal with the innermost convictions of the human being. If religion were not singled out for special treatment under s 60(1) of the Constitution, beliefs and practices protected under religious freedom would have been reduced to aspects of other rights such as freedom of expression (s 61), personal liberty (s 49) and freedom of association (s 58). Freedom of religion inspires other provisions of the Constitution, such as s 56(3) which prohibits discrimination based on religion.

Section 60(1) of the Constitution is based on the universal principle that every person has inherent fundamental rights and freedoms by virtue of being human. The principle is derived from Article 1 of the *Universal Declaration of Human Rights (1948)*, which states that "all human beings are born free and equal in dignity and rights". Freedom is one of the underlying values of the Declaration of Rights. Courts must interpret all rights to promote the underlying values of human dignity, equality and freedom. Human dignity has little value

without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. See *Ferreira* v *Levin N.O. and Ors* [1995] ZACC 13.

The Constitution recognises and embraces the fundamental principle that every person has a conscience. Conscience is to be understood as an experiential and spiritual phenomenon that compels a person to commit himself or herself unreservedly to an ideal. It is an inner moral command, force or sense that touches the very depths of a person's personality, steering him or her away from evil and toward good. The inner scruples of a person's conscience have the power to dictate his or her actions on matters falling within the area of the influence of conscience. The person is bound to act in accordance with the dictates of his or her conscience on matters of conscience, as such actions or beliefs are not governed by positive law.

The Constitution guarantees and protects the legal status of the person and his or her actions in accordance with the dictates of conscience to the extent that it recognises under s 60(1) the right to freedom of conscience and imposes on the State or any other person the negative obligation not to interfere with the person in the exercise of the freedoms included in the freedom of conscience. Freedom of conscience must be interpreted broadly to reflect the true meaning of the concepts used to denote the area of its operation.

Within the broad ambit of freedom of conscience falls freedom of religion. This means that the right to freedom of religion is a guarantee to every person of positive freedom to act on matters of religion without interference from the State or any other person. It also means that the right to freedom of religion is a guarantee to every person of negative freedom not to act on matters of religion at all or not to perform acts which are contrary to or in conflict with his or her religion or religious belief.

The principle is that the acts done or things said in accordance with matters of religion should be done or said freely and voluntarily by a person without hindrance, impediment or prohibition by the State or any other person.

Religion or faith is that system of fundamental doctrines and principles which provide to a person as comprehensive truth, without need for proof, answers to the fundamental question of the origin and purpose of the universe and human life.

The right of every person, at an appropriate stage of physical and intellectual development, to indulge in the contemplation of answers to the fundamental question about the source of origin of humanity, and to settle the question on the basis of an answer that takes the form of a religious belief which satisfies his or her spiritual needs, is a fundamental right which s 60(1) of the Constitution protects and guarantees to the person.

The matters to which freedom of religion applies include choice, adoption, change of religion, entertainment of religious belief, and free exercise, practice, or giving expression to religion or religious belief through activities of one's choice such as worship, observance and teaching. The person is free to exercise his or her right to freedom of religion alone or together with others.

In *R* v *Big M. Drug Mart Ltd* [1985] 1 SCR 295, 78 DLR (4 ed) 321, DICKSON CJC, writing for the Supreme Court of Canada, at para 94 said:

> "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 or hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination."

The exercise of religion has a central significance for every religious belief. Freedom of religion as a right is not guaranteed in the abstract for its own sake. It is guaranteed in relation to acts by which its existence is manifested. It is guaranteed in respect of acts that form the essential and integral aspects of the religion or religious belief. In other words, the act on its own may not be a religious matter. It becomes a religious matter when its nature, purpose and effect are assessed.

The right to freely choose, hold, change religion and entertain religious belief, and the right to freely practise, exercise and give expression to religion or religious belief, are inextricably linked. That means that acts that are directly connected with or are an essential or integral aspect of religion or religious belief are protected by the right to free exercise or practice of religion guaranteed under s 60(1) of the Constitution. In that sense, freedom of religion is relative, in that it must relate to matters connected with religion or religious belief.

Religious freedom under s 60(1) of the Constitution therefore guarantees to the individual a legal sphere in which he or she may adopt the lifestyle in respect of spiritual matters that corresponds to his or her convictions. This encompasses not only the internal freedom to choose, adopt, change religion, entertain, and hold religious belief. It also encompasses the individual's right to align his or her faith with, and to act in accordance with, the dictates of his or her conscience. Section 60(1) of the Constitution, as an expression of human dignity, protects those infrequently occurring convictions which diverge from the teachings of the churches.

It is not possible to properly establish the scope and purpose of the right to freedom of conscience, as entrenched in the Constitution, without reference to the inherent dignity of the person entitled to exercise the right. The two are not mutually exclusive, as the principle of

inherent dignity forms the basis upon which other fundamental rights can properly be understood. Section 3 of the Constitution provides that Zimbabwe is founded upon respect of the nation's diverse cultural, religious and traditional values. It also states that the country is founded upon the recognition of the inherent dignity and worth of all human beings.

In *S* v *Chokuramba* CCZ 10/19 at pp 14-15 of the cyclostyled judgment the Court commented on the interdependence between human dignity and human rights. The Court said:

> "Section 46 of the Constitution is the interpretative provision. It makes it mandatory for a court to place reliance on human dignity as a foundational value when interpreting any of the provisions of the Constitution which protect fundamental human rights and freedoms. This is because human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is therefore both the supreme value and a source for the whole complex of human rights enshrined in *Chapter 4* of the Constitution. This interdependence between human dignity and human rights is commented upon in the preambles to the *International Covenant on Economic, Social and Cultural Rights (1966)* and the *International Covenant on Civil and Political Rights (1966)*. The preambles state in express terms that human rights 'derive from the inherent dignity of the human person'. They all refer to '… the inherent dignity … of all members of the human family as the foundation of freedom, justice and peace in the world'. The rights and duties enshrined in *Chapter 4* of the Constitution are meant to articulate and specify the belief in human dignity and what it requires of the law."

In *Christian Education South Africa* v *Minister of Education* 2000 (4) SA 757 (CC) the Constitutional Court of South Africa at para [36] said:

> "There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. <u>The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to the sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights.</u> It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries." (the underlining is for emphasis)

The protection and the guarantee of freedom of religion under s 60(1) of the Constitution prescribe the nature of the relationship between religion and secularism or Church and State. The nature of the relationship between the State and religion defined by s 60(1) of the Constitution is gleaned from the consideration of the following underlying principles. They derive from the fundamental principle that the individual and not the State is the subject and centre of the right to freedom of conscience which includes freedom of religion.

The right to freedom of religion and its exercise, as protected and guaranteed under s 60(1) of the Constitution, is an intimately or deeply personal matter. Freedom of religion attaches to an individual. The State is not an individual. As such, the State has no liberty or right to freedom of religion. Freedom of religion and its exercise should not depend on the attitude of the State towards a particular religious creed in a democratic society based on the values of openness, justice, human dignity, equality and freedom.

Whilst the Constitution recognises and protects the right to freedom of religion as being inherent in every person by virtue of being human, it considers the State as a creation of the people, who vest in it powers to be used for their own interests in accordance with the rules prescribed by the Constitution and laws consistent with the Constitution. The State represents governmental power, which the people conferred on those in government to act in the public interest.

Under s 44, the Constitution imposes a positive obligation on the State to respect, protect, promote and fulfil every person's right to freedom of religion and to ensure the same conduct by individuals towards each other. The constitutional protection and guarantee of every person against interference by the State or any other person with the exercise of his or her religion or religious belief according to the rules of his or her faith imposes a negative

obligation. The purpose of the creation of the State is to ensure the protection and promotion of the fundamental rights and freedoms guaranteed to the individual under the Constitution.

The State cannot control the exercise of the right to choose, have, adopt, change religion or entertain a religious belief because the contents of the exercise of the right and their effects remain embedded in the conscience of the individual. The State may pass laws of general application to limit the exercise of the right to manifest, express or propagate religion or religious belief in the interests of the common good. The actions of the State are regarded by the Constitution as an exception, because the primary constitutional duty on the State is to respect, protect, promote and fulfil the fundamental rights and freedoms guaranteed to every person under s 60(1) of the Constitution. Underlying the constitutional order is the unity of the fundamental values and principles of human dignity, equality, justice and freedom which every governmental institution in a democratic society is required to protect and promote.

Every person is equal to the other by virtue of being human and having the right to freedom of religion. The State must not treat an individual or groups of individuals differently because of his or her or their religion. This means that, although Zimbabwe has not been constitutionally declared to be a secular State, the relationship between the State and religion as defined under the Constitution is based on the principle of State neutrality. The relationship between the State and Church is based on the principle that the State cannot have a religion of its own. Neither can the State choose a religion for people; nor can it force people to adopt a particular religion or religious belief. The establishment of an official religion or State church would be in contravention of s 60(1) of the Constitution.

The State must therefore adopt a position of neutrality in its relationship with individuals in respect of matters of religion. Neutrality embraces the principles of non-

identification and non-intervention. From the principle of non-identification embodied in s 60(1) of the Constitution it follows that there cannot be a State church in Zimbabwe. The principle of neutrality governing State and religion applies to public officials acting in their official capacities to guard against letting their own religious beliefs influence decision-making in the execution of public duties.

The power entrusted by the people to a constitutional State in a democratic society is conditional upon it being used for the purposes of protecting the freedoms of everyone enshrined in s 60(1) of the Constitution, including those who belong to minority religions or those who hold what may be considered unorthodox religious beliefs or non-religious beliefs. In other words, the State must let the individual live his or her own way insofar as spiritual matters are concerned. There may not be any orthodoxy in matters of spiritual beliefs. Monotheists, polytheists, atheists and agnostics are all protected in equal measure under s 60(1) of the Constitution. It is the constitutional duty of the State to provide equal protection of the law to believers and non-believers alike.

The principle of State neutrality towards religion derives from the principles of pluralism and diversity of religions and religious beliefs which in turn derive from the recognition that an individual is the subject and centre of the fundamental right to freedom of conscience. Zimbabwe is a religiously pluralistic society. There is bound to be pluralism and diversity of religions and religious beliefs in a democratic society based on the fundamental values of openness, justice, human dignity and freedom.

The principles of non-interference and neutrality by the State in matters of religion do not create a rigid wall of separation between the State and Church. As the constitutional obligation of the State is to ensure the respect, protection, promotion and fulfilment of the

fundamental right to freedom of religion, in a substantive sense its neutrality is not an abstract. It is a substantive neutrality which takes into account the fact that the exercise of the right to freedom of religion can be abused to the detriment of the common good or welfare of the community as a whole or to the injury of the fundamental rights and freedoms of others.

Whether the State has breached the principle of neutrality in its relationship with religion depends on the nature of the relationship and its effects on the exercise of the fundamental right to freedom of religion. The principle of neutrality in its regulation of how the State should relate to religion is a relative principle. It derives from the realisation that absolute or complete separation of the State from religion or Church in a democratic society is impossible. The reason is that the constitutional obligation on the State to protect and promote the right to freedom of religion inherent in the individual is not just in respect to itself as a potential violator of a fundamental right. It is also in respect of the State as the protector of the individual in the exercise of the fundamental right against the actions of others which cause or threaten injury to his or her right or harm or threaten harm to the public interest.

Whilst Government must not forbid religious beliefs nor discriminate against them, it must also go further to create a positive atmosphere of religious tolerance within society. The primary idea of freedom means that all religious creeds are tolerated and are free to flourish.

Woolman and Bishop "Constitutional Law of South Africa" Vol 3 at 41-25– 41-26 say:

> "There is no reason why state involvement with religion, or government actions that have a religious purpose or effect, would necessarily be coercive (even indirectly or subtly) and thus be inconsistent with the penumbra of the right to religious freedom. There is furthermore no simple correlation between separation of church and state and total religious freedom. While complete identification of church and state clearly undermines religious freedom, a rigorous policy of state non-identification with religion would likely be violative of freedom of religion. The apex of religious freedom therefore lies somewhere between positive identification and negative identification."

The learned authors proceed to conclude at 41-27 as follows:

> "An accommodationist approach would also appear to be preferable to a separationist stance because it would permit a government, in certain circumstances, to enact laws that have the primary or incidental purpose of benefiting a particular religion (but do not constitute endorsement). Such measures may well be required for the full protection of religious liberty. Worship or expressions of faith can have a public, as well as a private, dimension. Refusing to permit religious observances or other expressions or manifestations of faith in public *fora* can therefore constitute an infringement of the religious faith of certain adherents. Stated differently, a policy banning all worship or religious instruction from state institutions is not neutral vis-à-vis different religions (or even all adherents of one religion), or between religious adherents, atheists and agnostics."

The principle that matters of religion are deeply personal matters regulated by rules of faith means that the meaning of a religious belief, on the basis of which a person claims constitutional protection for his or her conduct, should be understood from the point of view of the individual not of the State. The effect of the recognition of the existence in every person as a human being of freedom of conscience as the root of moral judgment and its expression in the right to freedom of religion guaranteed under s 60(1) of the Constitution is that no positive law regulates matters of religion. Matters of a free conscience are not compellable by positive law. Religion becomes a source of regulation of conduct.

Human laws do not grant a court power to judge the efficacy of religious doctrine. It is not for a court of law to decide whether the matters which constitute the content of the individual's belief are as a matter of fact commanded by the fundamental doctrines or tenets of his or her faith. It is not for a court of law to ascertain the correctness or otherwise of the belief held by the person by measuring it against its understanding of the fundamental doctrines concerned.

Every member of a church or religious faith must, as a believer, concern himself or herself with the fundamental doctrines or tenets of the faith. A court of law must defer to him

or her in regard to the understanding of the fundamental doctrines or tenets by which his or her faith is governed. Religion is, after all, a matter of self-definition. It is the self-definition of the believer that the court of law must rely upon, as there would be no positive law setting out an objective standard by which it can measure the conformity of the conduct of a believer on matters of religion.

The test to be applied is whether the individual genuinely or conscientiously believes that the matters he or she believes in are in accordance with the fundamental doctrines or tenets of his or her faith. Where the issue is the objection by an individual to performance of acts required by governmental action, the test to be applied consistent with the constitutional protection of the right to freedom of religion is one that asks whether the claimant genuinely or sincerely believes that what he or she is being compelled to do is contrary to the fundamental doctrines or tenets of his or her faith as he or she understands them. Freedom of religion guaranteed under s 60(1) of the Constitution includes the right to freely elect not to do any act that is prohibited by or is contrary to one's religion or religious belief.

As long as a court of law finds as a matter of fact that the person claiming constitutional protection genuinely holds the belief that the matters to which his or her belief relates are commanded by the fundamental doctrines, tenets or rules of his or her faith, the belief would fall within the ambit of s 60(1) of the Constitution as a religious belief. It is not for a court of law to second-guess the believer by deciding the question whether he or she has correctly interpreted and understood the fundamental doctrine or tenet or rule of his or her faith. To do so would be to seek to provide an authoritative interpretation of the fundamental doctrines or tenets of a religion and to apply it to the belief held by the individual. That would be tantamount to the substitution of the court's conscience for that of the individual. A belief is internal to an individual, being a product of the dictates of his or her free conscience. Pure matters of faith

such as religious belief give effect to moral values. A court of law should resist the temptation to impose a secular objective perspective on the matter. The purpose of assessing the genuineness of a religious belief held by an individual is to prevent misuse of freedom of religion.

In *Bijoe Emmanuel and Ors* v *State of Kerala and Ors* 1986 SCR (3) 518 the Supreme Court of India at paras 13-14 said:

> "In *Ratilal's* case (*Ratilal Panachand Gandhi* v *The State Of Bombay & Ors* 1954 SCR 1035) we also notice that MUKHERJEA, J. quoted as appropriate DAVAR, J.'S following observations in *Jarnshedji* v *Soonabai*, 23 Bombay ILR 122:
>
> > 'If this is the belief of the Community and it is proved undoubtedly to be the belief of the Zoroastrian community, - a secular Judge is bound to accept that belief - it is not for him to sit in judgement on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind.'
>
> We do endorse the view suggested by DAVAR J'S observation that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant." (the underlining is for emphasis)

In *The Church of the Province of Central Africa* v *The Diocesan Trustees for the Diocese of Harare* 2012 (2) ZLR 392 (S), the Court held as follows at 411B-C:

> "The Court does not discuss the truth or reasonableness of any of the doctrines of the religious group. It does not decide whether any of the doctrines are or are not based on a just interpretation of the language of the *Holy Scriptures*. Whilst the Court does not take notice of religious opinions with the view to deciding whether they are right or wrong, it might notice them as facts pointing to whether a person has withdrawn his or her membership from the Church and who should possess and control Church property." (the underlining is for emphasis)

In *United States* v *Ballard* 322 U.S. 78 (1944), the United States Supreme Court held in this regard at p 87:

> "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the State. He was granted the right to worship as he pleased, and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain." (the underlining is for emphasis)

In *Re G (Education: Religious Upbringing)* [2013] 1 FLR para 27 SIR JAMES MUNBY said:

> "It is not for a judge to weigh one religion against another. The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect, so long as they are 'legally and socially acceptable' and not 'immoral or socially obnoxious' or 'pernicious'."

Section 60(1) of the Constitution addresses impediments to the exercise of the right to freedom of religious belief. The fact that the acts performed in the exercise of freedom of religion or religious belief must be related to or connected with the religion or religious belief adopted or held by the actor means that compelling a person to perform acts not related to or contrary to or forbidden by the religion or religious belief he or she holds violates the person's freedom to manifest or practise his or her religion or religious belief. In other words, forcing a person to perform acts that are related to a religion or religious belief which is not the one he or she holds coerces and torments the person's conscience. Freedom to practise one's religion or religious belief encompasses the right to perform acts which are in conformity with the individual's faith.

The application of the principle against coercion or compulsion on a person on matters of religion gives substantive value to the principle of voluntarism embodied in the concept of

freedom of conscience. Freedom of conscience demands that every person must be permitted to be his or her own master in respect of matters of choice, adoption, change of religion, entertainment of and adherence to religious belief and the exercise, practice, manifestation and propagation of religion or religious belief.

It is universally understood that rights protect a right-holder's self-determination and personal integrity. In our legal system, one generally has no right to control the life of another. This is a principle derived from the nature and meaning of the concept of right. The religious liberty protected by the free practice provision of s 60(1)(b) of the Constitution is the right of every person to freely choose his or her own course with respect to religious practice. It is a liberty to worship according to the dictates of one's own conscience. Section 60(1)(b) of the Constitution does not entitle anyone, nor can it be construed to entitle anyone, to force others to espouse certain religious beliefs or engage in particular practices or otherwise to control the life of another person in accordance with the dictates of that other person's own religion.

People simply do not claim a right under the freedom of religion provision to force another person to profess their beliefs. The provisions protect the right-holder's control over his or her own person. At the heart of liberty is the right to define one's own concept of existence, of the meaning of the universe, and of the mystery of human life. See *Planned Parenthood v Casey* 112 SCt 279 (1992).

In *S* v *Lawrence*; *S* v *Negal*; *S* v *Solberg* 1997 (4) SA 1176 (CC) CHASKALSON P remarked as follows at 1208G-1209A:

> "… freedom implies an absence of coercion or constraint and that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs. This is what the Lord's Day Act did; it compelled believers and non-believers to observe the Christian Sabbath."

<u>Subsection (3) of Section 60: Parental Right</u>

Section 60(3) of the Constitution acknowledges the importance of parents and guardians in the survival and development of children. Section 46(1)(c) of the Constitution provides that in interpreting a provision of *Chapter 4* which relates to the Declaration of Rights a court "must take into account international law and all treaties and conventions to which Zimbabwe is a party". The Court has taken into account the relevant provisions of the *Convention on the Rights of the Child (1990)* ("the *CRC*") in interpreting the provisions of s 60(3) of the Constitution. Zimbabwe is a party to the *CRC*.

The rights of parents and guardians to determine, in accordance with their beliefs, the moral and religious upbringing of the children in their custody derives from the principle that the care and the upbringing of children are duties primarily incumbent on parents and guardians. Article 18(1) of the *CRC* expressly provides that parents or guardians have the primary responsibility for the upbringing and development of the child. Article 5 of the *CRC* requires the State to respect the rights, responsibilities and duties of parents and guardians.

The Special Rapporteur on Freedom of Religion observed in a report to the United Nations General Assembly that:

> "The rights of parents to freedom of religion or belief include their rights to educate their children according to their own conviction and to introduce their children to religious rites."

(See: *Special Rapporteur on Freedom of Religion's Report to UN General Assembly* A/70/286 http:ap.ohchr.org/documents/d page-e.aspx?m-86).

The spiritual needs of a child are bound to be nourished by the religious belief of the parent or guardian, depending on the age and maturity of the child. Section 60(3) of the Constitution is clear, in that it requires that the parental right be exercised subject to the duty on the parent or guardian to protect, promote and fulfil the fundamental rights and freedoms of

the child. That includes the child's right to freedom of religion or religious belief. Article 14 of the *CRC* emphasises the importance of the rôle of the rights of the child in the parent-child relationship.

According to the provisions of s 60(3) of the Constitution, a person must have the legal status of being a parent or guardian to be possessed of the right conferred on him or her. Not every person can be a parent or guardian. The rights and responsibilities prescribed by s 60(3) of the Constitution are therefore functions of parenthood or guardianship until the child is capable of exercising those rights on his or her own behalf.

Not only does s 60(3) of the Constitution identify and protect the primary responsibility of parents and guardians in the upbringing and development of a child, it also underlines the principle that a child is an individual with a right to be heard on matters affecting him or her commensurate with his or her age and maturity. Constitutional liberties pertain to individuals. Parents and children do not possess unitary interests.

Whatever considerations may justify protecting the right of adults to control their own lives, they do not validate an unqualified right of adults to deprive the children in their custody of the right to decide as free and rational persons what kinds of lives they will choose to lead. The parent-child relationship is a relationship of two individuals, each with a separate intellectual and emotional makeup. Children are distinct persons with rights of their own under the Constitution. A child is a subject of his or her own rights.

The parent or guardian is entitled to decide that the child in his or her custody shall be brought up in accordance with the values of his or her own religion. Section 60(3) of the Constitution uses the word "determine", which implies the making of a decision on matters affecting the child after careful consideration of the interests of the child.

Section 60(3) of the Constitution should not be interpreted to mean that the parental right authorises one person to dominate or control the life of another to satisfy his or her own religious interests. To do so would be contrary to the fundamental principle and value of equality. A child is a human being with inherent dignity, deserving of respect from others including those acting as his or her custodians.

Section 60(3) of the Constitution cannot be construed to mean that the parental right endows a parent or guardian with the power to indoctrinate the child with his or her religious belief notwithstanding the harm such conduct would have or has on the wellbeing of the child. No-one, including a parent or guardian, would have a right to subject a child to coercion or compulsion which would impair his or her freedom to have or adopt a religion or religious belief of his or her own choice.

Parental rights and responsibilities are not unbounded. There are provisions in the Constitution and the *CRC* which set out principles which guide a parent or guardian on the factors he or she has to take into account when making decisions on matters affecting the spiritual development of the child. The guiding principles set certain boundaries on the upbringing and development of children in terms of s 60(3) of the Constitution.

The first guiding principle is that the parent or guardian must proceed on the basis that a child is a separate person with inherent dignity as a human being, entitled to respect and protection from harm to his or her religious interests. The parent or guardian must accept that under s 60(3) of the Constitution a child has his or her own right to freedom of religion, entitling him or her to decide, if he or she has the ability to form a view and express it on matters affecting him or her, on what to do in the exercise of religion.

Honouring the agency and inherent dignity of children by according them meaningful participation in decision-making on matters affecting them is an important way of showing

children that they are valued. In a document titled "*Faith and Children's Rights*" produced by Arigatou International New York in 2019 (arigatouinternational.org) at p 84, the authors make the observation that children are "subjects of rights" with individual identities that must be respected. The right of a parent or guardian to guide the spiritual development of the child and the right of the child to practise his or her own religious belief are both indispensable.

The second guiding principle, as set out in Article 3(1) of the *CRC*, provides that in all actions concerning children the best interests of the child shall be a primary consideration. Article 18(1) of the *CRC* requires parents and guardians to have the best interests of the child as their basic concern when discharging the primary responsibility of the upbringing and development of the child.

So, in determining matters relating to the upbringing of the child in accordance with his or her religious belief a parent or guardian must ensure that the best interests of the child and not his or her own interests are promoted as a result. It is clear that the overriding principle that the best interests of the child shall be a primary consideration in all actions concerning the child has become universally acceptable. It is expressly provided for under s 81(2) of the Constitution, which provides that "a child's best interests are paramount in every matter concerning the child". A parent or guardian is bound by the Constitution when performing the primary responsibility of bringing up a child.

There is, however, no fixed standard of what will be in the best interests of the individual child. The law does not start from a prior assumption about what is best for any individual child. It looks at the child and weighs a number of factors in the balance, depending on the circumstances of the case. See *In Re J (Child Returned Abroad: Convention Rights)* [2006] 1 AC 80 paras 37-39.

Religious norms are brought into focus by s 60(3) of the Constitution, which recognises that they should be taken into account by a parent or guardian and be the determinant factor in his or her decision on matters affecting the upbringing of the child according to his or her religious belief. If a religious norm is by its nature harmful to the best interests of a child or what it commands the parent or guardian to do in the practice of his or her religious belief is harmful or poses a substantial threat of harm to the best interests of the child, the Constitution mandates intervention by the State through the courts for the protection of the best interests of the child. The interests underlying the rule of law that a parent or guardian has a right to determine the upbringing of the child in his or her custody in accordance with his or her religious belief are those of the child. The rule merits constitutional protection because its purpose and primary object is the protection and promotion of the best interests of the child.

Like any other human being, every child is unique. The principle is that the activity to which the parent or guardian subjects the child in accordance with his or her religious belief should on the whole be conducive to the well-being of the child. Such a matter is of paramount consideration and is not rendered irrelevant by the religious motivation of the parent or guardian. The approach is based on the personhood and distinct interests of children. The special protection of the principle of the best interests of the child is guaranteed to all children who are subject to the exercise of the parental right until they have their own opportunity to make life's religious decisions for themselves upon the attainment of the age of reason.

The *CRC* establishes a direct relationship between the child and the State. It renders the child visible as a subject of rights, entitled to protection on his or her own behalf. It empowers the State to intervene when necessary to protect the rights of the child in recognition that the best interests of children are not always protected by parents or guardians.

The third guiding principle is that the parent or guardian is under a duty to direct the spiritual development of the child in his or her custody in terms of s 60(3) of the Constitution in a manner that is consistent with the evolving capacities of the child. Article 14(2) of the *CRC* recognises the right and duty of a parent or guardian to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Article 5 of the *CRC* imposes an obligation on the State to respect the responsibilities, rights and duties of parents or legal guardians "to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child" of the rights recognised in the *CRC*. The use of the words "appropriate direction and guidance" is clearly intended to set an objective standard by which the decision of the parent or guardian can be measured.

As subjects of rights, children's voices must be heard and given due weight in matters that concern them, in keeping with their evolving capacities. The Special Rapporteur on Freedom of Religion has observed that parents or legal guardians have the right and duty to direct the child in the exercise of his or her freedom of religion or belief. He said "such direction should be given in a manner consistent with the evolving capacities of the child in order to facilitate a more and more active rôle of the child in exercising his or her freedom of religion or belief thus paying respect to the child as a rights-holder from early on".

The principle of evolving capacities of the child by which a parent or guardian is required by Article 14(2) of the *CRC* to be guided when providing appropriate direction and guidance to the child in the exercise of his or her right to freedom of religion was discussed in a document titled "*Evolving Capacities*" prepared for UNICEF and SAVE THE CHILDREN. The author of the document said:

> "The concept of evolving capacities is central to the balance embodied in the Convention between recognising children as active agents in their own lives, entitled to

> be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth. This concept provides the basis for an appropriate respect for children's agency or their capacity to act and make decisions without exposing them prematurely to the full responsibilities normally associated with adulthood. As children grow up, they have evolving capacities and a growing understanding and maturity."

The author of the document also states that the concept of evolving capacities recognises that children in different environments and cultures who are faced with diverse life experiences will acquire competencies at different ages. Their acquisition of competence will vary according to circumstances. Children, therefore, require varying degrees of protection, participation and opportunity for autonomous decision-making, in different contexts and across different areas of decision-making.

The words "in a manner consistent with the evolving capacities of the child", used in Article 14(2) of the *CRC* suggest that the degree to which a parent or guardian can influence a child's religious formation is universally proportional to the age of the child. In other words, parents or guardians may be able to bring up the children in their custody in accordance with their own religious faith and practice, but they should gradually grant the children more freedom on religious matters as they mature into adulthood. Recognition of the agency of children avoids the conflation of the religious freedom of parents and guardians with that of the children.

In summary, the principle underlying s 60(3) of the Constitution is that the responsibility of involving a child in matters of religion and bringing him or her up to be a good citizen lies with the parent or guardian. The State will not interfere with the performance of parental duties in the absence of clear and affirmative evidence of harm or "substantial threat of harm" to the best interests of the child.

The parental right provided for under s 60(3) of the Constitution and the attendant duties come to an end when, in terms of s 80(1) of the Constitution, the child attains the age of eighteen years. When the boy or girl attains the age of eighteen years, he or she becomes an adult and is deemed at law to have acquired full capacity for self-autonomy and self-determination as a holder of fundamental rights and freedoms.

APPLICATION OF THE LAW TO THE FACTS

The Applicant And His Children

That recitation of the pledge is made compulsory in schools has not been disputed by the respondents. The applicant in his founding affidavit made a positive allegation to the effect that he had been informed that his children were required to memorise and recite the pledge at the beginning of the next school term on 03 May 2016. The respondents did not deny the allegation in their opposing affidavit.

The applicant and his children hold the belief that saluting a flag is an act of worshipping a secular object prohibited by what the applicant considers, on the literal interpretation of the Bible in *Exodus 20:3-5*, to be a fundamental doctrine of his faith. He does not object to the use of the national flag in the pledge and its symbolism. He accepts and respects the national flag and what it symbolises as a secular object. What the applicant objects to on religious grounds is the governmental action of compelling his children to perform the act of saluting the flag as part of the recitation of the pledge.

The Court does not have to involve itself with the question whether the compulsory recitation of the pledge in the current form amounts to worshipping the national flag as alleged by the applicant. The question is whether the applicant sincerely believes that the recitation of

the pledge in the current form, including in particular the reference to the act of saluting the national flag, is worshipping a secular object which offends against his and his children's deeply held religious belief that worship is reserved only for God.

The applicant genuinely believes that saluting a flag is prohibited by the relevant *Scripture*, which declares that worship must be solely reserved for God. The matters of worship and who should be worshipped are matters of religious conscience. They are matters covered by the relevant rules of the applicant's faith.

The matter of saluting a national flag being believed to be an act of worshipping a secular object and therefore forbidden by the fundamental doctrine of the applicant's religion is a matter of belief internal to the applicant. Whether the applicant has correctly interpreted the fundamental doctrine or tenet of his faith is not for the Court to decide. The Court only has to decide whether the applicant genuinely holds the belief, on the literal interpretation of *Exodus 20: 3-5,* that saluting a flag is an act of worship forbidden by the rule of his faith to the effect that worship should be solely reserved for God.

The fact that the belief held by the applicant has a basis in the literal interpretation of the wording of the *Scripture* is evidence in itself of the genuineness of the belief held by the applicant. The State may not evaluate its citizens' religious convictions or characterise their religious beliefs as right or wrong. The applicant and his children have a right to act according to his understanding of his faith. He and his children have a right not to be forced to commit an act contrary to this understanding.

The respondents did not proffer evidence to contradict the fact that the applicant truly and conscientiously believes what he says. He does not hold his belief idly and his conduct is

not the outcome of any perversity. The claim by the applicant is not qualified by the fact that he accepts that he belongs to the Christian faith, which is a monotheistic religion.

The applicant's claim for religious freedom is based on a practice deeply rooted in the religious belief shared by members of his church. In other words, the religious objection to his children being compelled by the State to recite the pledge with the pronouncement of the act of saluting the national flag would have been raised even if the words "Almighty God, in whose hands our future lies" had not formed part of the wording of the pledge. The argument by the first respondent that the applicant believes in the "Almighty God" referred to in the pledge and that no other God is referred to misses the point.

The respondents did not put in issue the allegation by the applicant that his religious belief is that worship as an act of expressing religion must be reserved only for God. The first respondent's contention was that the recitation of the pledge is not worship in the religious sense of the word. Whether the ceremony for the compulsory recitation of the pledge is a form of worship is not for the Court to decide.

There is no doubt that the recitation of the pledge in the current form has a religious character. If this were not the case, there would be no need to include in the language of the pledge the words "Almighty God, in whose hands our future lies". The belief was held by the applicant and his children before the pledge was imposed. It was not raised in an attempt to avoid participating in the recitation of the pledge.

There are decided cases from other jurisdictions involving members of the Jehovah's Witnesses sect objecting to taking part in the compulsory salutation of national flags on the ground that saluting the flag is against their religious belief that worship must be reserved only

for God. See: *West Virginia State Board of Education* v *Barnette* 319 U.S. 624; *Donald* v *The Board of Education for the City of Hamilton* 1945 Ontario Reports 518.

The approach adopted by those courts has not been to impose on the claimant an objective definition of religion for the purposes of constitutional protection of the right to freedom of religion. The approach has been to decide whether the claim by the applicant was based on a sincerely held religious belief. Once the court decided that the belief was religious and that the applicant genuinely believed the ideas espoused, a finding that his or her right to freedom of religion has been infringed followed. An approach to the concept of religion must therefore adequately dovetail with an appropriate test of sincerity.

It is rarely necessary to determine the religiousness of beliefs, since the State may not compel persons to believe anything. A belief is what an individual believes, not what the State compels him or her to believe as it cannot do that under the Constitution. Whether a belief is religious would depend on whether the individual genuinely believes it is religious. In other words, whether what is believed relates to religion is assessed in the light of the nature of the belief and its sincerity. The sincerity of the applicant's religious belief is beyond question.

There is a shared interest in regarding the conscience as sacred and inviolable and as the core governing unit of society located within the individual. In a state of freedom of conscience, the individual is expected to act in accordance with the dictates of his or her conscience. There is no positive law governing conduct in respect of the matters relating to religion. The Constitution requires that the manner in which the individual handles matters relating to religion be left to the dictates of his or her conscience, the freedom of which it guarantees under s 60(1). The presumption is that what a free conscience dictates is good for the individual and the community at large.

Whether an individual is able to exercise the freedom to act in accordance with the manner dictated by his or her conscience will depend on the circumstances in which he or she finds himself or herself at the time he or she is confronted with the matter relating to religion. If, for example, he or she is exposed to a matter relating to religion at a time when he or she is under subordination of authority or he or she is at a place where his or her presence is required by law he or she would have his or her freedom to act according to his or her conscience compromised.

A schoolchild, whose conscience dictates that he or she should not salute the national flag during the recitation of the pledge because doing so is contrary to his or her religious belief, would find it difficult to act in accordance with the dictates of his or her conscience because of the position of subordination to authority in which he or she is placed. He or she would also find it difficult to act in accordance with the dictates of his or her conscience because of the compulsion imposed on him or her by the policy and the governmental action to recite the pledge and to salute the flag. The schoolchild is then forced to act contrary to his or her conscience. No constraint of conscience can be appropriate. Any dominance of a faith would be unjust, for faith ought to be free of all subjection to humans. Faith knows subjection only to its own rules or fundamental doctrines.

In *MEC for Education, Kwazulu-Natal* v *Pillay* 2008 (1) SA 474, the Constitutional Court of South Africa emphasised the fact that entitlement to respect for one's voluntary religious practices is a necessary element of freedom and inherent dignity of any individual. The court said:

> "A necessary element of freedom and of dignity of any individual is an entitlement to respect for the unique set of ends that the individual pursues. One of those ends is the voluntary religious … practices in which we participate. That we

choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and dignity … .”

The compulsion imposed on the applicant’s children by the education authorities to salute the national flag during the recitation of the pledge infringed the children’s right to freedom of religion protected and guaranteed by s 60(1) of the Constitution. The circular or directive to the effect that it was compulsory for every schoolchild to recite the pledge and to salute the national flag had no legal sanction behind it in the sense that it was not issued under the authority of any statute.

The Education Act [*Chapter 25:04*] does not empower education authorities to compel a child to do anything which is against his or her religion or religious belief. Without a provision under the Education Act, in terms of which the legality of their conduct could be tested, the education authorities adopted a position that accepted that their conduct was a direct infringement of the right to freedom of religion. They sought to justify the conduct by saying that it is authorised by the Preamble to the Constitution.

The benefits alleged to accrue to society from the compulsory flag salute do not justify the correlative violation of an individual’s freedom. Loyalty and unity cannot be demanded in violation of fundamental rights; they can only be attained by the exercise of an individual’s volition.

In the *Barnette* case *supra* MURPHY J at 646 said:

“Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship … . I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. … Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and

> recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full."

In *Zylberberg* v *Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641, quoted with approval by the Supreme Court of Canada in *S.L.* v *Commission Scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, the court struck down a regulation under the Education Act, R.S.O. 1980, c. 129, which made the recitation of Christian prayers compulsory in public schools unless an exemption was granted. The court at 654 said:

> "On its face, [the regulation] infringes the freedom of conscience and religion guaranteed by s. 2(*a*) of the Charter. … The recitation of the Lord's Prayer, which is a Christian prayer, and the reading of *Scriptures* from the Christian Bible impose Christian observances upon non-Christian pupils and religious observances on non-believers."

<u>The Applicant's Parental Right</u>

Insofar as the nature of the compulsory recitation of the pledge in the current form encroaches on the religious freedom, it is primarily the constitutional position of the child who must participate in the recitation of the pledge which is directly affected. Fundamental human rights are, however, interrelated and interdependent. Not only are certain rights dependent on the realisation of other rights, the rights of individuals are deeply interconnected with the rights of others. If parents' or guardians' rights are violated, the children in their custody are at greater risk of harm. The fulfilment of children's rights depends in part on securing the rights of parents or guardians.

The applicant's parental right enshrined in s 60(3) of the Constitution is affected when he is compelled to expose his school-age children to a recitation of the portion of a pledge of allegiance which offends his religious belief. The protection of the religious belief of his children demanded by the applicant is an inseparable part of the parent-child relationship. The

Constitution specifically protects the right of the applicant to demand the protection of his children's freedom of religion by guaranteeing the parental right to determine the bringing up of his children in accordance with his faith.

Considering the special weight to which the religious element of the bringing up of a child is entitled under the Constitution, a school activity exposing the child to a possible affirmation of the truth of a different religious belief would severely tax the entire parent-child relationship. Participation by the applicant's children in the recitation of the pledge in the current form could be interpreted to be an affirmation by his children of the religious belief held by other Christians that saluting the national flag is not prohibited by the Scripture relied upon by the applicant.

There is therefore an inseparable connection between the task of the applicant as the up-bringer of his children and his religious belief. The burden on the parent-child relationship brought about by the compulsory recitation of the pledge and the salutation of the national flag by the applicant's children brings him into conflict with his own religious convictions. The conflict infringes the protected sphere of the applicant's fundamental right to freedom of religion enshrined in s 60(1) of the Constitution.

The fundamental right to freedom of religion includes the right of the applicant as a parent to pass on to his children the kind of religious convictions he considers right. Compelling the applicant to allow his children to be exposed to religious influences which contradict his own convictions would adversely affect his parental right under s 60(3) of the Constitution. As a parent charged with the primary responsibility of bringing up his children in accordance with his religious belief, the applicant is entitled to protect himself against governmental action which adversely affects his right.

The parental right under s 60(3) of the Constitution does not set forth an affirmative right of control on the basis of which a parent can demand that the education authorities should not formulate a pledge of allegiance with reference to the salutation of the national flag and the saying of the words "Almighty God, in whose hands our future lies". The applicant does not claim such a right.

Position Of Children Not Sharing The Religious Belief Embodied In The Words "Almighty God, In Whose Hands Our Future Lies"

Certain ideas, such as belief in the existence of God, His nature and His relationship with humans, are inherently religious. Anyone saying the words "Almighty God, in whose hands our future lies" makes a claim to what he or she considers to be comprehensive truth about the existence of God and His attributes. He or she is making a religious claim, whether relying on faith or reason. The words constitute a statement of profound religious significance.

The features the statement "Almighty God, in whose hands our future lies" refers to are characteristic of monotheistic religions. Monotheism is a religion to which belong people who genuinely believe in the truth of the doctrine or prescription on the existence of God. The essence of the belief is that God is a supernatural being capable of controlling and directing human life and is entitled to reverence, obedience and worship from believers.

The mere saying of the words "Almighty God, in whose hands our future lies" would be an acknowledgement of monotheism, even if one does not have to believe in the truth of the prescription. The decision to adopt or to have a monotheistic religion or religious belief must be the result of an individual's exercise of freedom of conscience.

Instead of acting in a manner that respected and protected the right to freedom of religion of all the schoolchildren who were to recite the pledge, the education authorities sought

to impose by compulsory recitation of the pledge in the current form certain religious beliefs on every schoolchild reciting the pledge. The education authorities took a position for the schoolchildren on a religious or spiritual matter in respect of which parents or guardians would want the children in their custody to hold different views.

The constitutional protection of the right to freedom of religion is based on a broad concept of religion. It would cover even those people who reject the idea of dependence on a creator for a guide to morality. There are people who hold a belief in and devotion to goodness and virtue for their own sakes. A sincere and meaningful belief which occupies in the life of the possessor a place parallel to that occupied by God in the monotheistic believer comes within the constitutional protection. See *United States* v *Seeger* 380 US 163 (1965) at 166. Section 60(1) of the Constitution protects theistic, non-theistic and atheistic beliefs as well as the right not to profess any religion or religious belief.

The population in Zimbabwe adheres to and practises different religions and religious beliefs, such as Christianity, Islam, Judaism, Hinduism, Buddhism and traditional religion. It is a religiously pluralistic society, although Christianity has a majority of believers. The religiously pluralistic condition of society would be reflected in the religious beliefs held by the schoolchildren compelled to recite the pledge with the words “Almighty God, in whose hands our future lies”.

The applicant’s complaint was that forcing schoolchildren who do not share the monotheistic religious belief to say the words “Almighty God, in whose hands our future lies” as part of the recitation of the pledge is to coerce the children to affirm the existence of God and His attributes.

The State cannot compel a person to perform acts which are forbidden by the religion he or she belongs to. The duty to say the words exalting God in the pledge would seriously impair the freedom of religion of the schoolchildren who do not hold the religious belief embraced by the words “Almighty God, in whose hands our future lies”.

The coercion on the schoolchildren to say the religious words offends the religious beliefs of the schoolchildren who belong to religions that do not espouse the belief in God, His oneness and His power to directly and actively influence human life. It offends the schoolchildren who belong to religions that espouse belief in the existence of more than one god. It offends those schoolchildren who, whilst believing in the existence of a supernatural power, do not believe in that force in the form of a god. It also offends the schoolchildren who do not hold belief in the existence of a supernatural power. Their belief begins and ends with the existence of a human being as a matter of fact. They do not hold a spiritual belief in the existence of a supernatural being arising from seeking to find answers to the question of how the human being came to be in existence in the first place.

The compulsion suggests to the schoolchildren who hold polytheistic religious beliefs or nontheistic beliefs that their beliefs are inherently less religious than the theistic ones embraced by the pledge. At best, there is an unconscious bias against nontheistic religions and their beliefs in the adoption as part of the pledge a statement that has as its content acceptance in the existence of God and exaltation of His powers. According to para 4 of the *Human Rights Committee General Comment No. 22*, acts protected by freedom of conscience must give direct expression to one’s religion or religious belief.

Children are generally regarded as impressionable people who are vulnerable to outside influences because of their age and level of maturity. Young schoolchildren are, in any case, hardly capable of critically asserting themselves against their environment. The exposure of

the schoolchildren to the mandatory saying of the religious words in the pledge during its recitation every school day in formal ceremonies would condition their minds to eventually accept as the truth the contents of the words.

The affected children may end up believing in the existence of God who is a supernatural being with powers to control and direct human life, at the same time commanding reverence and obedience from human beings believed to be his creation. In other words, saying the religious words under compulsion on a daily basis during school term under the guidance of teachers might have some kind of proselytising effect on those children who belong to religions and hold religious beliefs different from those depicted by the prescribed religious words.

The impression likely to be created in the children's minds would be that for one to become the ideal person who lives according to the values and principles espoused by the pledge, one has to be a believer in the features of the monotheistic religions represented in the words "Almighty God, in whose hands our future lies". The children may think that one may not embrace the values of patriotism and national identity without at the same time being a holder of the belief in the existence of God.

Schoolchildren may begin to believe that the future at the school, for anyone who refused to say the religious words forming part of the pledge for reasons of a coerced conscience, would be in jeopardy at the displeasure of God in whose hands the future of every person is said to lie. Participation in the recitation of the pledge would, in the circumstances, be out of fear that one's future at the school would be imperilled.

There is, in fact, an implied suggestion that the secular values pursued by the pledge are consistent with the values of monotheistic religions only. Whilst it is ideal that every citizen

should be patriotic and embrace the other values set out in the pledge, it is certainly not a constitutional expectation that citizens should belong to monotheistic religions. The fact that the values pursued by the pledge also form part of the values espoused by monotheistic religions does not entitle those religions to a more favourable treatment by the State at the expense of other religions and religious beliefs.

In guaranteeing to every person in equal measure freedom of religion, s 60(1) of the Constitution prevents endorsement or disapproval of any religion or religious belief by the State, thereby promoting the richness of religious pluralism and diversity. The observance and enforcement of the principle of pluralism and diversity of religions and religious beliefs protected by the Constitution would promote the attainment of patriotism as the secular objective of the pledge. It promotes equality, peace and tolerance amongst people of diverse faiths.

In *Torcaso* v *Watkins* 367 U.S 488 (1961) the appellant was an atheist and he refused to take an oath of office, which required a declaration of belief in the existence of God. The court, while quoting *Everson* v *Board of Education* 330 U.S. 1 (1947), found as follows at p 495:

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'. Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

On 19 August 2005 the United States Court of Appeals, Seventh Circuit in *Kaufman* v *McCaughtry* 419 F.3d 678 (7th Cir. 2005) upheld the right to freedom of religion of a person who wanted to start a religious group based on the rejection of the idea of belief in the existence of a supreme being. The court said at p 684:

> "The problem with the district court's analysis is that the court failed to recognise that Kaufman was trying to start a religious group, in the sense we discussed earlier. Atheism is Kaufman's religion, and the group that he wanted to start was religious in nature even though it expressly rejects a belief in a supreme being. As he explained in his application, the group wanted to exercise freedom of thought, religious beliefs, creeds, dogmas, tenets, rituals and practices, all presumably from an atheistic perspective. It is undisputed that other religions are permitted to meet at Kaufman's prison, and the defendants have advanced no secular reason why the security concerns they cited as a reason to deny his request for an atheist group do not apply equally to gatherings of Christian, Muslim, Buddhist or Wiccan inmates. …
>
> But the defendants have not answered Kaufman's argument that by accommodating some religious views, but not his, they are promoting the favoured ones. Because the defendants have failed even to articulate - much less support with evidence - a secular reason why a meeting of atheist inmates would pose a greater security risk than meetings of inmates of other faiths, their rejection of Kaufman's request cannot survive the first part of the *Lemon* test."

Besides atheism, there exist other forms of religion or beliefs. For instance, agnosticism is one such doctrine. Agnostics subscribe to the doctrine that humans cannot know of the existence of anything beyond the phenomena of their experience.

<u>JUSTIFICATION OF INFRINGEMENT OF THE RIGHT TO FREEDOM OF RELIGION</u>

<u>Limitation of Fundamental Rights</u>

The contention by *Mr Hofisi* was that the applicant is proposing a pledge of allegiance, the formulation and execution of which respects the religions and religious beliefs of the schoolchildren who have to recite it. There is, of course, the need to ensure that the public interest in the realisation of the legitimate objective of instilling in schoolchildren the virtues of the values of patriotism and the other ethical precepts embraced by the pledge through its recitation is protected.

Mr Uriri did not challenge the premise of the proposition on which *Mr Hofisi* built and advanced the applicant's case. The reason is that *Mr Hofisi's* argument was based on a premise, the essence of which was an acceptance of the legitimacy of the secular objective of inculcation

of patriotic feelings in schoolchildren. He argued strongly that what was objectionable about the pledge in the current form was the inclusion of the element of compulsion on the children to do acts and to say words contrary to their religious beliefs as part of the pledge as a means of accomplishing the legitimate objective. *Mr Hofisi's* contention was simply that it was the substantive effect of the compulsory religious part of the means chosen for the achievement of the legitimate objective that rendered the pledge unconstitutional.

Having come to the conclusion that the compulsory recitation of the pledge in schools infringes the rights guaranteed under s 60 of the Constitution, the next inquiry is whether the pledge can be saved under s 86(2) of the Constitution or must be declared constitutionally invalid.

Section 86(3) of the Constitution makes provision for fundamental human rights which are non-derogable. The right to freedom of religion is not one of them. It is not unlimited. The justification for limitation of fundamental human rights and freedoms is the principle that they must be reasonably exercised and with due regard for the rights and freedoms of other persons.

The principle enshrined in s 86(1) of the Constitution recognises the fact that, like all the fundamental rights, freedom of religion guaranteed under s 60 has as its point of departure the view of a human being in the Constitution as a responsible personality, developing freely within the social community. It can be restricted by the Legislature by a law of general application with constitutional anchors and sufficient safeguards for the rule of law when community goods are endangered.

Section 86(2) of the Constitution contains requirements, the contents of which include compelling public interests that would justify certain restrictive State actions and limit the

exercise of the right to freedom of religion. The State can limit the exercise of the right to freedom of religion only to the extent and in the manner prescribed under s 86(2) of the Constitution.

An examination of the contents of the requirements of acceptable limitation of a derogable fundamental right or freedom shows that the object of s 86(2) of the Constitution is to ensure that the essence of the fundamental right or freedom is preserved. The primary constitutional duty on the State is to protect and promote fundamental human rights and freedoms enshrined in *Chapter 4*. The power to limit the exercise of derogable fundamental human rights and freedoms is an exception to the primary duty to respect, protect, promote and fulfil fundamental human rights and freedoms. It is for this reason that limitations to the exercise of fundamental human rights and freedoms must be construed strictly and narrowly, whilst fundamental rights and freedoms must be given broad and generous interpretation.

Section 86(2) of the Constitution provides:

> "86 **Limitations of rights and freedoms**
>
> (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors including …". (the underlining is for emphasis)

Section 86(2) sets the minimum requirement for the limitation of a fundamental right. A proper reading of the section points to the fact that only a law of general application may limit a right enshrined in *Chapter 4* of the Constitution. The limitation section is premised upon the fundamental tenet of the rule of law, which reinforces the idea that public authority may only be exercised where the law clearly provides for it.

Currie and De Waal in "*The Bill of Rights Handbook*" (6 ed, Juta & Co (Pty) Ltd 2013) at p 155 describe the concept behind the requirement that the limitation must be in terms of a law of general application as follows:

> "The 'law of general application' requirement is the expression of a basic principle of liberal political philosophy and of constitutional law known as the rule of law. There are two components to this principle. The first is that the power of the government derives from the law. The government must have lawful authority for its actions, otherwise it will not be a lawful government but will be despotism or tyranny."

In *Chimakure and Ors* v *The Attorney-General of Zimbabwe* 2013 (2) ZLR 466 (S), the Court fortified the position that the rights enshrined in *Chapter 4* can only be limited in terms of the law. The Court held as follows at pp 495F-496A:

> "It is a fundamental principle of constitutional law that any restriction which hinders the enjoyment of a fundamental right must be introduced by a legal provision. The grounds for the justification of the restriction must be found in the law by which it is imposed. Fundamental rights and freedoms and other constitutional values are protected by the fundamental law which is the supreme law of the land. Restrictions imposed on them must be consistent with the fundamental law otherwise they are void.
>
> The requirement that the restriction on the exercise of the right to freedom of expression must be contained in law is expressive of and consistent with the principle of the rule of law. The principle is to the effect that every governmental action which adversely affects the legal situation of persons in a free and democratic society must be justifiable by reference to an existing law."

The *dictum* of NGCOBO J in *Affordable Medicines Trust and Others* v *Minister of Health and Others* 2006 (3) SA 247 (CC) is apposite. It was held as follows at para 49:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

While interpreting the requirement of s 1 of the Canadian Charter of Rights and Freedoms, to the effect that a limit on the exercise of freedom of expression must be "prescribed by law", BROWNRIDGE JA in *Regina* v *Therens* [1985] 13 CRR 193 at p 216 held as follows:

> "The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s 1 if it is expressly provided for by statute or regulation or results by necessary implication from the terms of the statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule."

See also *R* v *Thomsen*, 1988 CanLII 73 (SCC), [1988] 1 S.C.R. 640 at pp 650-51.

In *McKinney* v *University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, the Supreme Court of Canada per WILSON J remarked as follows at p 386:

> "Section 1 … serves the purpose of permitting limits to be imposed on constitutional rights when the demands of a free and democratic society require them. These limits must, however, be expressed through the rule of law. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of the law-making process are effective." (the underlining is for emphasis)

It cannot be gainsaid that a limitation of a fundamental right enshrined in the Constitution must be in terms of a constitutional provision, a statute and/or its subordinate legislation. This is because the limitation of a right must, of necessity, be as a result of a meticulous and extensive legislative process. The limits should be interpreted narrowly, thereby respecting the importance of the fundamental right or freedom sought to be protected and enforced. A balance has to be found between respecting the religious freedom of the schoolchildren objecting to participation in the compulsory recitation of the pledge as currently formulated and the legitimate public interest in having the values of patriotism and the other ethical precepts referred to in the pledge inculcated into schoolchildren.

The Executive cannot introduce measures which have a direct impact on fundamental rights secured by the Constitution without there being a law that authorises such action. Where such measures are taken in the absence of legislative provisions backing the impugned

measures, the resultant effect is that the conduct will fall short of the standards set by s 86(2) of the Constitution and will consequently be void. For the pledge to survive constitutional scrutiny, it must be established that it is contained in a law of general application.

PREAMBLE TO THE CONSTITUTION

As regards the legality of the pledge, it is the respondents' contention that the pledge was taken from the Preamble to the Constitution. It is on this premise that the respondents aver that the pledge does not violate fundamental rights enshrined in the Constitution, unless an inference is made that the Preamble to the Constitution is *ultra vires* the substantive provisions of *Chapter 4* of the Constitution.

The State has to convincingly establish with something more than unproven assertions of administrative convenience that limiting the otherwise constitutionally protected activity is reasonably justifiable in a democratic society. It must do so by reference to the substantive standards of permissible limitation of fundamental rights prescribed by s 86(2) of the Constitution.

The Preamble to the Constitution reads as follows:

"We the people of Zimbabwe,

United in our diversity by our common desire for freedom, justice and equality, and our heroic resistance to colonialism, racism and all forms of domination and oppression,

Exalting and extolling the brave men and women who sacrificed their lives during the *Chimurenga/Umvukela* and national liberation struggles,

Honouring our forebears and compatriots who toiled for the progress of our country,

Recognising the need to entrench democracy, good, transparent and accountable governance and the rule of law,

> Reaffirming our commitment to upholding and defending fundamental human rights and freedoms,
>
> Acknowledging the richness of our natural resources,
>
> Celebrating the vibrancy of our traditions and cultures,
>
> Determined to overcome all challenges and obstacles that impede our progress,
>
> Cherishing freedom, equality, peace, justice, tolerance, prosperity and patriotism in search of new frontiers under a common destiny,
>
> Acknowledging the supremacy of Almighty God, in whose hands our future lies,
>
> Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work,
>
> And, imploring the guidance and support of Almighty God, hereby make this Constitution and commit ourselves to it as the fundamental law of our beloved land."

Whilst the fact that the religious words are in the Preamble to the Constitution is in itself not a justification for violation of a fundamental right or freedom as required by s 86(2) of the Constitution, it is important to locate the rôle of the Preamble in the Constitution. It is axiomatic that different constitutions assign different rôles to preambles. The different functions played by preambles in constitutional enterprises are represented in the form of three models.

From *Plato's Laws* through common law and until modern legal systems, preambles to constitutions have played an important rôle in law and policy-making. Simply put, a preamble presents the history behind the constitution's enactment, as well as the nation's core principles and values. A preamble may be a part of the constitution. With summary formulae, it may express the fundamental ideas and constitutional aims that the makers wanted to engrave into the text of the constitution. They are sometimes enforceable, but in other jurisdictions they are not viewed as formally operative.

Orgad L in "*The Preamble in Constitutional Interpretation",* International Journal of Constitutional Law, Volume 8, Issue 4, October 2010, p 714–738 (2010) comments on the legal status of preambles in the following terms:

> "The preamble has several functions. To begin with, it has an educational purpose: it is one of the most significant sections of the constitution that is mentioned in educational and public arenas. Unlike the constitution —usually a very long document including complex provisions — the preamble is relatively short and is written in a more accessible language. Next, the preamble has an explanatory purpose: it serves to specify the reasons for the constitution's enactment, its *raison d'être* and eternal ideals. In addition, the preamble has a formative purpose: it constitutes a political resource for the consolidation of national identity and serves as a national 'calling card'. The preamble has a legal purpose as well. This section sketches a three-part typology of preambles: a ceremonial preamble, an interpretive preamble, and a substantive preamble."

As has been said above, there are basically three types of preambles. The first one is the ceremonial preamble. A ceremonial preamble, as per *Plato's* assertion, is designed to convince the people why laws are morally good. Laws are intended to establish a self-controlled society and, to that end, they need to be virtuous. This virtue is established in the preamble, the soul of the law, which sets the tone for the people to freely comply with the law. It is a vehicle by means of which the legislator "sells" legislation to the people.

Plato's notion of a preamble is meant to justify the law. A good preamble would persuade the people to obey the law, not because of civil or criminal sanctions but because it is a good law. The purpose of the preamble is to mitigate the harshness of the law and thus a law without a persuasive preamble is a "dictatorial prescription". *Plato's* preambles use abstract terms and invoke poetic ideals. However, they are not regarded as an integral part of the law and they do not create rights or have binding interpretative power.

Orgad *supra* is of the view that an example of a ceremonial preamble is contained in the Constitution of the United States because it is persuasive, symbolic, and, generally, has no legal force. It is couched in the following manner:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The second type of preamble is the interpretive preamble. The use of preambles in constitutional interpretation is quite usual in common law and civil law legal systems. This rôle of preambles is particularly emphasised when they include keynotes or guidelines for constitutional interpretation. A good example is the Preamble to the Constitution of South Africa.

In interpreting the Preamble to the Constitution of South Africa, the Constitutional Court of South Africa in *United Democratic Movement* v *Speaker of the National Assembly and Others* [2017] ZACC 21 at para 31 stated the following:

> "The Preamble to our Constitution is a characteristically terse but profound recordal of where we come from, what aspirations we espouse and how we seek to realise them. Our public representatives are thus required never to forget the role of this vision as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of their constitutional obligations. Context, purpose, our values as well as the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public office-bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution."

In S v *Mhlungu and Others* 1995 (3) SA 867 (CC) at p 913H-914A the court stated that:

> "The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and

> indicate it fundamental purposes. (See too the concluding passages.) This is not a case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we gather their intention not from our subjective wishes, but from looking at the document as a whole."

In respect of the third class of preambles, named substantive preambles, they can be regarded as legally binding constitutional clauses and they serve as independent sources for rights and obligations.

An example of a substantive preamble that governs constitutional interpretation is in France where the Constitution of the Fifth Republic (1958) provides as follows:

> "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.
>
> By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development."

The Preamble to the 1958 Constitution did not originally enjoy binding legal force, nor was it even considered an integral part of the Constitution. However, on 16 July 1971 the *Conseil Constitutionnel* (Constitutional Council) recognised the preamble's binding force as an independent legal source of human rights. For the first time, the Constitutional Council found an Act passed by the French Parliament to be unconstitutional because it contradicted freedom of association, one of the "fundamental principles recognised by the laws of the Republic". See Constitutional Council - Decision no. 71-44 DC of 16 JULY 1971.

In India, the significance of the preamble in a constitution was underscored in the case of *Kesavananda Baharati* v *State of Kerala* (1973) 4 S.C.C. 225. At para 538 the court held:

> "We shall first deal with the Preamble in our Constitution. The Constitution makers gave to the preamble the pride of place. It embodied in a solemn form all the ideals and aspirations for which the country had struggled during the British regime and a Constitution was sought to be enacted in accordance with the genius of the Indian people. It certainly represented an amalgam of schemes and ideas adopted from the Constitutions of other countries. But the constant strain which runs throughout each and every article of the Constitution is reflected in the Preamble which could and can be made sacrosanct. It is not without significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the Constituent Assembly. The preamble was, therefore, meant to embody in a very few and well defined words the key to the understanding of the Constitution."

A distinctly unique example of a substantive preamble appears in Nepal. Article 116(1) of the Constitution of Nepal, 2015 proclaims that "a bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament". An analysis of the clause shows that it invalidates even a constitutional amendment which violates the spirit of the Preamble. In that regard, Nepal is unique, not only for the specific provision indicating the legal status of the Preamble, but also for taking additional measures to protect the Preamble's ***spirit***.

In Zimbabwe, the Preamble to the current Constitution can best be characterised as ceremonial. It was formulated and added to the Constitution after the instrument and its normative provisions had been drawn up or drafted. The Preamble is not a numbered section in the body of the Constitution. It is not regarded as an integral part of the law as it does not create rights and obligations. The law is independent of the Preamble. It differs from the Preamble that existed in the Constitution prior to the Constitution of Zimbabwe Amendment (No. 14) Act, No. 14 of 1996.

Prior to the Constitution of Zimbabwe Amendment (No. 14) Act, No. 14 of 1996, the Preamble to the Declaration of Rights was provided in terms of s 11 of the Constitution and it read as follows:

> "Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, 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;
>
> (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 the compulsory acquisition of property without compensation;
>
> and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, 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 herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

In interpreting the above Preamble, the Supreme Court in *Rattigan and Ors* v *Chief Immigration Officer and Ors* 1994 (2) ZLR 54 (S) found that the Preamble constituted part of the Declaration of Rights. The court made the following pronouncement at p 59C-D:

> "In *In re Munhumeso and Ors* 1994 (1) ZLR 49 (S) this court was of the view that the upgraded status of the provision from a Preamble in each of the four earlier Constitutions, to a numbered section, signified that it is to be regarded as conferring substantive rights on the individual, and not merely a guide to the intention of the framers in enacting *Chapter III*. It was accepted to be the key or umbrella provision in the Declaration of Rights under which all rights and freedoms must be subsumed, and that it encapsulates the sum total of the individual's rights and freedoms in general terms, which may be expanded upon in the expository, elaborating or limiting ensuing ss 12 to 23.
>
> I can perceive of no warrant to differ from that analysis and reiterate my respectful concurrence with the reasoning of AMISSAH JP and AGUDA JA in *Dow* v *A-G supra* in the passages of their respective judgments at 636e-637c and 669i-670c."

It is therefore apparent that the Preamble to the Declaration of Rights was construed as a substantive one.

Section 3 of the Constitution makes the intention of the makers thereof clear that Zimbabwe as a constitutional republic is based on its fundamental values and principles set out therein. Section 3(1) is a clear declaration that the Constitution is the supreme law of the land and that any law, conduct, custom or practice inconsistent with its provisions is invalid to the extent of the inconsistency.

The constitutional provisions guaranteeing the fundamental human rights and freedoms take precedence over what is said in the Preamble. What is said in the Preamble cannot be used to justify a limitation to a fundamental human right or freedom enshrined in *Chapter 4* of the Constitution if such justification does not meet the requirements of acceptable limitation of a fundamental right or freedom prescribed under s 86(2) of the Constitution.

The current Preamble merely sets out the history behind the Constitution's enactment, as well as the nation's core principles and values. A further key difference is that the current Preamble is a preamble to the whole Constitution, as opposed to the erstwhile Preamble which was a prelude to the Bill of Rights.

It has been agreed that the current Preamble to the Constitution is merely ceremonial or symbolic and that it does not confer any substantive rights. Consequently, the question that falls for determination is whether a pledge that is premised on such a Preamble may be used as a basis to interfere with or limit fundamental rights contained in *Chapter 4* of the Constitution. This brings to the fore the issue pertaining to the limitation of fundamental rights in terms of s 86 of the Constitution.

It has been contended by the respondents that there is nothing wrong in "acknowledging God" at the beginning of the pledge, as the Preamble to the Constitution acknowledges the same. It is from this background that the respondents justify the acknowledgment of a deity in

the pledge. As has already been established above, the Preamble to the Constitution is ceremonial in nature and thus cannot be used to limit rights enshrined in the Constitution.

The Supreme Court of the United States had an opportunity to consider the effect of a ceremonial preamble of the Constitution with regard to executive power. HARLAN J in *Jacobson* v *Massachusetts*, 197 U.S. 11 (1905), while delivering the opinion of the court, held as follows at p 22:

> "We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§ 137, c. 75) is in derogation of rights secured by the Preamble of the Constitution of the United States. Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom." (the underlining is for emphasis)

It is not disputed that the pledge does not fall within any of the categories mentioned above, and thus does not qualify as a law for the purposes of limiting a fundamental right in terms of the limitation provision. The pledge has the effect of denying the applicant's children and other school-going children their fundamental rights. Since it is not authorised by any law, there is no possibility of justifying the infringement of the applicant's rights in terms of s 86(2) of the Constitution.

The purpose served by the pledge is a secular one. The officials in the Ministry of Primary and Secondary Education were entitled to adopt the mechanism of a pledge of allegiance in pursuit of the legitimate secular objective of inculcating into children attending infant, primary and secondary schools the virtues of the values of patriotism, national identity

and the other ethical precepts considered lacking in society. The objective of instilling in schoolchildren the values of patriotism, national identity, honesty and hard work can be achieved without infringement of the right to freedom of religion of the schoolchildren participating in the recitation of the pledge. Good citizenship in a secular society does not necessitate the abandonment of religious discipline.

Patriotism is a heritage that every nation must pass on to its children if it has pride in itself as an independent and sovereign nation of people who share common values and aspirations enshrined in a constitution which defines its destiny. Patriotism entails the appreciation and upholding of the foundational constitutional principles and values of nationhood, which include the plurality and diversity of religions and religious beliefs characteristic of Zimbabwean society. Compulsion as employed in the pledge was not a permissible means for achieving its legitimate objective of inculcating in schoolchildren feelings of patriotism.

CONCLUSION

There is a tension between negative and positive religious freedom. The tension cannot be neutralised by the elimination of the reference to the salutation of the national flag and the saying of the words “Almighty God, in whose hands our future lies” from the pledge. The elimination of these elements from the pledge would infringe the right to freedom of religion of those children and their parents or guardians who want the saluting of the national flag and the saying of the religious words in the course of the recitation of the pledge to be observed.

An appropriate relief in the circumstances would be one that would effectively protect and enforce the right of freedom of religion of the dissenting children and their parents or guardians without infringing the right of the other schoolchildren to exercise the positive

freedom to recite the pledge in the current form. The education authorities ought to have guaranteed the dissenting pupils' right to decide freely not to perform the act of saluting the national flag or not to say the words "Almighty God, in whose hands our future lies" when the time for doing so came up in the course of the recitation of the pledge.

DISPOSITION

It is ordered as follows -

"(1) The application be and is hereby granted with no order as to costs.

(2) It is declared that the policy requiring all children in schools to recite the pledge of allegiance as formulated is constitutionally invalid, in that it violates the right to freedom of religion enshrined in s 60(1) of the Constitution in relation to the applicant's children and schoolchildren not sharing the belief in the existence of God, and the parental right enshrined in s 60(3) of the Constitution of Zimbabwe in relation to the applicant.

(3) As a result of the declaration in paragraph (2) above, the education authorities may formulate a pledge of allegiance which allows schoolchildren who, on conscientiously held religious beliefs, object to saying the words 'Almighty God, in whose hands our future lies' and to saluting the national flag to be exempted in the course of the recitation of the pledge from saying the religious words or saluting the national flag."

GWAUNZA DCJ: **I concur**

GARWE JCC: **I concur**

GOWORA JCC: I concur

HLATSHWAYO JCC: I concur

GUVAVA JCC: I concur

MAVANGIRA JCC:I concur

BHUNU JCC: I concur

UCHENA JCC: I concur

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners