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The Facts

The appellant, Kelvin Hang'andu, had been a member of the Law Association of Zambia (LAZ) since 15 November, 1996, when he was admitted to the Bar. On 24 May 2003, he converted from the Catholic Church to the Seventh Day Adventist (SDA) Church, which considers Saturday as a sacred day set aside for worship and complete abstention from work and other activities unrelated to religious practice. The essence of the appellant's complaint was that the LAZ held its annual general meetings on Saturday, which was a violation of his religious freedom and discriminatory. His protests to the LAZ yielded no results. It was then that he petitioned the High Court for redress. The High Court dismissed the petition, finding no violation of the appellant's rights and it was against this decision that the appellant was before the Supreme Court ("the Court").

Holding

The Court upheld the decision of the High Court. In relation to freedom of religion, the Court held that the LAZ did not hinder the appellant from enjoying his right. This was based on the Court's interpretation of Article 19(1) of the Constitution, which provides:

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

In the Court's view, the operative word in the provision is 'hindered.' It relied on the dictionary definition of the word 'hinder,' which it took to mean 'an impediment, obstacle, barrier, bar, obstruction, restraint, restriction, limitation, encumbrance that tends to abrogate fundamental rights and freedoms that would require judicial intervention and redress.' Based on this definition, the Court took the view that the LAZ did not infringe the appellant's religious freedom as it had not done anything positive to hinder his enjoyment of his rights. The Court

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was further of the view that there was no evidence on record that the respondent hindered the appellant in the enjoyment of his rights as the decision to be holding meetings on Saturday was made by the LAZ before the appellant became a member.

Coming to the second issue of discrimination, the Court dismissed it in similar manner, on the ground that the appellant was not discriminated against. The Court took the narrow view that the appellant's failure to attend the respondent's Saturday meetings was as a result of his faith and not an act of the respondent. Further, the Court found that it was essential for the appellant to prove that he was denied the privilege of attending the respondent's meetings wholly or mainly because he was an Adventist and to also prove that the other category of the respondent's members was afforded the privilege of attending its meetings wholly or mainly on the basis of their creed. The Court also took into account the fact that Saturday, as the date for holding meetings, was arrived at, based on the majority consent of the members as the most convenient day; emphasizing that there was no evidence that holding the meeting any other day between Monday and Friday would not inconvenience other members of the LAZ.

Significance

This case commentary argues that the *Hang'andu* case was wrongly decided as the reasoning of the Court is defective. This case commentary advances four arguments in support of this view. First, the Court demonstrated a superficial understanding of the nature of religious freedom. In dismissing the claim of violation of Hang'andu's religious freedom, the Court noted that it was actually his religion which prevented him from participating in LAZ activities hosted on Saturdays, and not as a result of any positive action taken by LAZ. The implicit effect of the decision was to put the appellant in a conundrum of either choosing to fulfil his religious obligations or to forego some of his rights under LAZ. The appellant could not exercise both at the same time, as long as meetings were held on Saturdays. In effect, the Court was blaming the appellant's religion as the bar to his LAZ participation. It goes without saying that this had the effect of belittling the appellants religious views.

Religious associations play a key role in maintaining democracy as they may serve as a counterweight to overbearing state power.[3] More importantly, religious associations play a

[3] Patrick Lenta, "Taking Diversity Seriously: Religious Associations and the Work-Related Discrimination," in Stu Woolman and David Bilchitz (ed), *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy About the South African Constitution* (Pretoria University Law Press, 2012), 80

cardinal formative role for individuals. That is, such associations are integral to an individual's self-understanding, invariably meaning that there can be no 'self' without the associations that give an individual that 'self.'[4] Religious associations also "enhance social cohesion, and are the indispensable setting for meaningful action."[5]

This role of religion in shaping human identity and providing space for meaningful interaction was recognized by the South African Constitutional Court in the case of *Minister of Home Affairs and Another v Fourie and Another* in the following words:

> 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 their 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. Such belief affects the believer's view of society and founds a distinction between right and wrong. It expresses itself in affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.[6]

This fact alone entails that no religious views, no matter how much one disagrees with them, should be treated dismissively, let alone by a court entrusted with enforcing human rights. It is common place that Zambia is a multi-religious country. As a result, disagreements based on religion are common. How then should a court deal with such disagreements and competing claims based on religious views, as emerged in the *Hang'andu* case? The first role of the court in such cases is to understand that freedom of religion demands the recognition of potentially irreconcilable diversity. Religious freedom is a right that recognizes and gives expression to diversity. All religions, big or small, should therefore be accommodated. De Vos and Freedman have correctly observed:

> This conundrum highlights the fact that freedom of religion and conscience is a right that demands serious engagement with the notion of diversity: how to accommodate different and often diametrically

[4] Stu Woolman, 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta,' in Stu Woolman and David Bilchitz (ed), *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy About the South African Constitution* (Pretoria University Law Press, 2012), 118
[5] Ibid, 118
[6] Minister of Home Affairs and Another v Fourie and Another CCT 60/04 [2005] ZACC 19, para 89

> opposed beliefs and views about the world, while respecting and accommodating these diverse beliefs and views.[7]

What is notable about the *Hang'andu* judgment is that the Supreme Court failed to appreciate the need for diversity and the imperative of mutual or reasonable accommodation. By holding that it was the appellant's religion and not a positive action of LAZ that prevented him from attending LAZ meetings held on Saturdays, the Court failed to take into account the need for reasonable accommodation as a concomitant element of religious freedom. This effectively placed the appellant in a position where he had to either honour his religious obligations or abrogate them in order to participate in LAZ activities held on Saturday. Strangely, the Court did not consider this a hindrance to the practice of his faith. The Supreme Court's decision implicitly entails that the appellant misunderstood his religion as it was to blame and not LAZ for his failure to attend LAZ activities. This approach is incorrect and going beyond the role a court should play in intersectional human rights disputes. As O'Connor, a former US Supreme Court judge stated, it is wrong for the courts to make decisions implying that "adherents misunderstood their own religious beliefs."[8]

The case of *MEC for Education*[9] is instructive in terms of how the Supreme Court could have approached the *Hang'andu* case in terms of understanding religious freedom as being premised on diversity and the need, therefore, for accommodation. The case involved the issue of Sunali, a girl who wore a nose stud to school, against the school's code of conduct which forbade wearing such. The code pre-existed her enrolment into the school. The nose stud was worn as part of her culture and Hindu religion. The school ordered her to cease wearing the stud at school and argued that since she could wear the stud outside school hours, there was no violation of her culture and religion. The Court disagreed with this approach, taking the view that as far as possible, a person should not be forced into a Hobson's choice with regard to their religion. According to the Court, this is because, "we cannot celebrate diversity by permitting it only when no other option remains."[10] The Court further held that it did not matter whether the impugned religious practice was voluntary or obligatory in order to protect it. More importantly, in determining whether there was a hindrance to the enjoyment of one's religion,

[7] Pierre de Vos and Warren Freedman, *South African Constitutional Law in Context* (Oxford University Press, 2014), 483
[8] Lyng v Northwest Indian Cemetery 485 US 439, para 457
[9] MEC for Education KwaZulu-Natal and Others v Navaneethum Pillay and Others [2007] ZACC 21
[10] Ibid

the Court took the view that it is not about the taking of positive steps to violate the rights of the complainants but the about "how far the community must be required to go to enable those outside the 'mainstream' to swim freely in its waters."[11] The Court ultimately held that preventing the student from wearing her nose stud while at school would "undermine the practice and therefore constitute a significant infringement of her religious and cultural identity" and that although the wearing of the stud may not have been compulsory under her religion, "what is relevant is the symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome."

Similarly, by failing to undertake a value analysis of freedom of religion and failing to go beyond the dictionary definition of what constitutes the hindrance to one's religious freedom, the Court failed to accommodate Hang'andu and celebrate religious diversity. It effectively sent a clear message that his religion is not welcome in LAZ, that LAZ could still operate without his input and, therefore, he was an insignificant member. It was wrong for the Court to consider a hindrance to religious freedom as only occurring where the respondent took positive action to violate the victim's rights. Simply creating a situation imposing a Hobson's choice on someone is a fetter on the exercise of one's rights.

The second argument builds on the first. The Supreme Court, in dismissing Hang'andu's case reasoned in part that changing the date for LAZ meetings could also inconvenience the 'majority' of the members of LAZ who felt that Saturday was the most convenient day. The import of this reasoning is to subject one's enjoyment of human rights to the views of the majority or popular views on an issue. This approach is incorrect and has no basis in law. There is nowhere the Zambian Constitution predicates the enjoyment of one's rights on popular or majority views. Article 19(5) of the Constitution, which contains internal limitations of religious freedom, only contemplates limitations which are reasonably required either in the interests of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of other persons.

When faced with competing claims in rights premised on diversity, the correct approach to take is to embark on a qualitative analysis, not based on statistics but on the need for co-existence or reasonable accommodation. As the South African Constitutional Court stated, protection of

[11] Ibid

religious freedom "is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity."[12] The Canadian Supreme Court has also taken a similar approach of qualitative balance when it held that "when two protected rights come into conflict, Charter principles require a balance to be achieved that fully respects the importance of both rights."[13] The Kenyan judiciary has also taken the same approach and remarked that "it does not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members or other groups."[14]

In fact, the essence of enshrining human rights in the Constitution is to shield and place them above the easy reach of popular sentiment so that they are no longer seen as mere privileges enjoyed at the benevolence of the majority. Without this realization, constitutional rule could easily degrade into tyranny of the majority or rule by mob. Indian Chief Justice, Dipak Misra, correctly captured this perspective when he argued that:

> The concept of constitutional morality urges the organs of the state, including the judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or miniscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the rule of law. The veil of social morality [majority views] cannot be used to violate fundamental rights of even a single individual, for the foundational morality rests upon the recognition of diversity that pervades the society.[15]

Simply put, the enjoyment of constitutionally protected rights cannot be premised on the approbation of the majority. It was wrong and not justified in law for the Supreme Court to condition the enjoyment of Hang'andu's freedom of religion on the views of the majority of LAZ members.

Thirdly, in dealing with the issue of discrimination, the Court woefully failed to appreciate that discrimination can either be direct (formal) or indirect (substantive). In holding that LAZ did not discriminate against Hang'andu because it did not take any positive action to that effect, and that the impugned decision to hold meetings on Saturdays pre-existed his LAZ

[12] Christian Education South Africa v Minister of Education Case CCT 4/00 (2000) para 25
[13] Dagenais v Canadian Broadcasting Corp [1994] 3 SCR 835
[14] Eric Gitari v Non-Governmental Organisations Co-ordination Board and Others Petition No. 440 of 2013
[15] Navtej Singh Johav and Others v Union of India and Others Writ Petition (Criminal) No. 76 of 2016, para 253

membership, the Court demonstrated unbelievable misunderstanding of how nuanced discrimination can be.

Direct or formal discrimination refers to when a law, action or decision is facially discriminatory.[16] An example of this would be a law which expressly forbids women to serve as police officers. Such a law would be manifestly discriminatory on the face of it. Indirect or substantive discrimination is not apparent on its face. Such discrimination may on the face appear neutral but its effect may be to exclude or disadvantage. An example of this is the cautionary rule of evidence which requires complaints of sexual assaults such as rape and defilement to be corroborated. Although couched in neutral manner, when one takes into account that the majority of victims of such crimes are women and that such corroboration is not required for other serious offences like homicides and robberies, it becomes clear that the cautionary rule is discriminatory against women.[17]

It is this indirect or substantive discrimination that Hang'andu suffered. In fact, the *Hang'andu* case brings to the fore the failure to take into account substantive discrimination because the narrow approach of only acknowledging formal discrimination simply allows for unconscious bias to be institutionalized as universal norms everyone should conform to. De Vos and Freedman were correct in arguing that the narrow focus on formal or direct discrimination "ignores the fact that neutral standards often embody the interests and experiences of socially privileged groups whose views and attitude are so dominant that they have become invisible and appear to be neutral."[18]

It is clear from the judgment that although LAZ did not directly discriminate against Hang'andu, it indirectly discriminated against him by placing a burden on him of choosing either to obey his religious commands or to violate them in order to fully participate in LAZ activities. By choosing to honour his beliefs, he was effectively made to cede some of his LAZ membership rights.

[16] Iain Currie and Johan de Waal, *The New Constitutional and Administrative Law* (Juta, 2001), 256
[17] It is actually for this reason that may jurisdictions have abandoned or repealed laws requiring corroboration in sexual offences. For a detailed discussion of this, see IH Dennis, *The Law of Evidence*, 2nd Ed (Sweet and Maxwell, 2002), 496- 540
[18] Pierre de Vos and Warren Freedman, *South African Constitutional Law in Context* (Oxford University Press, 2014), 421

Fourth and finally, the Supreme Court held that Hang'andu's rights were not violated because he failed to prove that changing the day for holding LAZ meetings from Saturday to any other weekday could not inconvenience other (majority) members of LAZ. This is grotesque reasoning as it demonstrates that the Court conflated the issue of the violation of a substantive right on the one hand and the ordering of a remedy to redress the grievance, on the other. The two are distinct. The finding of a violation of a human right is based on the proving of the facts complained of. Ordering a remedy only arises when a violation has been proved. The appropriateness of a remedy is not what proves the violation of a right. Once a litigant has proved the violation of their right, there is no concomitant duty to prove that the proposed remedy will not inconvenience the respondent. For example, where one suffers a violation of their rights and the Court decides to order compensation, there is no requirement for the successful party to prove to the court that the money the respondent will use, for example, will not come from money set aside for the education of children or for procurement of medicines. Had the Court separated the issue of the violation of rights from that of providing a suitable remedy, and had it found a violation of the rights complained of, it was open for the court to order a better tailored remedy to redress the violation. Article 28(1) of the Constitution gives the Court wide discretion to order remedies as it is open to the Court to "make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of constitutionally protected rights."[19] It was open, for example, to the Court to order that the LAZ meetings should be held on rotational basis such that the inconvenience is spread across all the days of the week. This would ensure that all members were equally inconvenienced, but at least would not permanently disadvantage or advantage one group above others.

[19] Article 28(1) Constitution of Zambia 1991