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Editor's Note

In this issue we have articles on a wide range of subjects. Some of them are based on papers presented at the very successful Commonwealth Law Conference held in Malta last April. There are many more such papers submitted for publication and I am hoping to be able to carry suitable ones progressively over the next couple of issues.

We start off with an important discussion on how the concept of fairness has been dealt with by the courts in the United Kingdom in recent years. This is a topic of far-reaching importance given how central fairness is to the lives of people. Richard Clayton KC explains the approaches that British judges have been taking, not least in the area of procedural fairness which features prominently in administrative law cases. He makes the seminal point that "the content of the duty of fairness depends on the context and particular facts of each case" and notes that the law is now clear about the principle of bias extending to international arbitrators as well.

Another issue of continuing topicality is how clashes between individual human rights and the collective rights of indigenous or tribal communities which flare up in certain societies can be resolved. Daniel Pole, a lawyer based in Canada, tackles this question head on using the example of Zambia where the matter has come up before the courts on more than one occasion. His article analyses two groundbreaking decisions of the High Court where freedom of conscience, thought, and worship had to be balanced against African traditional or tribal customs. In both cases, notes Pole, the court unequivocally affirmed the supremacy of the country's Constitution which contains strong guarantees in favour of individual rights. In his view, "Courts should preserve and protect internationally recognised fundamental human rights. Customary law must be respected, but it is subordinate to the Constitution and international human rights instruments." He believes that decisions such as these will be valuable not only on the African continent but globally.

A third noteworthy article in this issue deals with the reconciliation efforts underway in Australia between the majority population and the minority indigenous groups. Ron Heinrich and Saxon Quick trace the evolution of these efforts and explain the various milestones that have been reached. They strike an optimistic note in their assessment:

> Australia's efforts towards reparations and reconciliation have progressed significantly over the last 30 years. More crucially, they are continuing to progress into the future. While indigenous Australians have undoubtedly faced setbacks, including legislative restrictions on native title and the failure of the Voice referendum, on the whole we are seeing a net improvement in the rights and cultural protections for this population.

In addition to these, we carry a short piece by Sean Xue, an undergraduate student, on what he calls the eroding legitimacy of law in the polarised age we are living under. He is concerned about the future of the rule of law, and avers that: "The real battle is not in courtrooms, but in the public square – in the stories we tell about the law, and the faith we place in its fairness." Xue's essay won the International Law Book Facility's student essay competition 2025.

There are a couple of other articles which also, I hope, will interest you. These address the role of in-house counsel in ensuring compliance with anti-money-laundering measures in the gambling industry in Africa, and the war on financial crime in the legal sector in Nigeria.

On a slightly lighter note, we have an engaging piece by the CLA's Honorary Life Treasurer, Laurie Watt, describing the highlights of, and mood at, the recently concluded Commonwealth Law Conference. Laurie is an inveterate attender of CLCs and has, moreover, for nearly a decade now, been contributing a Diary which, among other things, always succeeds in bringing out the flavour of the event to those who may not have been lucky enough to be there in person. Readers will, I am sure, find Laurie's descriptions of the festivities in Malta thoroughly enjoyable.

Here's wishing you a pleasant summer!

– Dr Venkat Iyer

Rights of Minorities in Tribal Communities in Zambia

Daniel Pole

Introduction

Both the law of Zambia and international jurisprudence uphold individual fundamental rights, including freedom of religion. What should the courts do when these fundamental human rights conflict with tribal customary law? How can the collective rights of indigenous or tribal communities coexist with the individual rights of minorities or other individuals within the community? These are some of the issues which have faced the Zambia courts. This article examines how the High Court of Justice in Zambia has endeavoured to find a delicate balance, addressing both the rights of minorities in the tribal communities and the collective rights of indigenous communities.

Human rights context

The High Court of Zambia rendered two groundbreaking decisions regarding freedom of conscience, thought, and worship in the face of African traditional or tribal customs—*Fungwe and Others v Muntanga (Chief Nyawa IV)*[1] and *Banda and Mwale v Lemmy Phiri*.[2] These decisions will be valuable not only on the African continent but also globally, as they reflect a judicial harmonising of culture and traditions with respect for national constitutions and internationally recognised human rights. The Zambia courts faced a dilemma that is common worldwide: how can the collective rights of indigenous or tribal communities coexist with the individual rights of minorities or individuals in the community? Both collective and minority rights deserve protection and preservation. The judicial decisions under analysis are consistent with an international trend towards providing standards to guide courts in resolving conflicting rights.

The Constitution of Zambia acknowledges the existence and the rights of indigenous communities and tribes, including a degree of autonomy for institutions like the chiefdom, their customary law, and their cultural values. But at the same time, it protects individual freedom of conscience and religion. These guarantees have found similar expression in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and People's Rights (Banjul Charter), all of which Zambia has ratified.[3] The importance of these ratifications was particularly noted by the High Court of Zambia in *Fungwe and Others v Muntanga (Chief Nyawa IV),*[4] which we shall consider first.

Overview of *Fungwe and Others v Muntanga*

In *Fungwe and Others v Muntanga,* the petitioners were Jehovah's Witnesses, living in the Musuba village of the Kazungula District in Southern Province, Zambia. The respondent was the traditional chief of the Tonga-speaking people of the Kazungula District in Southern Province, Zambia, the chiefdom under which the petitioners resided. The Tonga-speaking people form part of the people of the Bantu group.[5] Their livelihood is centred around herding cattle and growing crops.[6] The Tonga were originally organised in independent family units. In time the colonial administration made appointments of chiefs among them. This resulted in a chieftainship arrangement that has now become a part of the Tonga traditional way of life.[7] As is true with many tribes in Zambia, the Tonga are known for holding annual traditional ceremonies, the main one being the Lwiindi Gonde ceremony, which is a thanksgiving ceremony to celebrate the first harvest and to thank the ancestors for the good harvest.[8] It is this ceremony that led up to the events that culminated in the matter requiring a judicial determination by the courts.

The respondent dissolved the petitioners' village because the petitioners did not contribute to or take part in the Lwiindi traditional ceremony. He then formed three new villages in the place of the dissolved one. The petitioners explained that they refused to participate in the ceremony because it conflicted with their personally held religious beliefs. They were ordered to join the newly formed Mantanyani village on the condition that they would agree to support and participate in the Lwiindi traditional ceremony. They refused and appealed to the High Court of Zambia, submitting that their right to freedom of religion and other inalienable rights accruing to them as citizens of Zambia had been violated by the chief's order. The respondent neither appeared in court nor did he file any arguments to defend the petition. On October 31, 2017, the High Court of Zambia issued a judgment in favour of the petitioners.

The court recognised the constitutional and legal protection

1 *Fungwe & Others v Muntanga (Chief Nyawa IV)* (Oct 31, 2017) 2013/HP/1778 (High Court of Zambia).

2 *Banda & Mwale v Phiri* (May 16, 2018), 2014 HP/218 (High Court of Zambia).

3 Zambia ratified the ICCPR on April 10, 1984 and the Banjul Charter on Jan 10, 1984.

4 *Fungwe & Others v Muntanga* supra note 1.

5 Australia: Refugee Review Tribunal "Country Advice Zambia" (Nov 24, 2010) *Refworld*, available at: *https://www.refworld.org/docid/4d9997312.html* (last accessed Jul 27, 2023).

6 S Brown "Zambian Cultural Heritage – The Tonga People – Their Traditions and Customs" (June 8, 2009) *Ezine Articles*, available at *http://EzineArticles.com/2448636* (last accessed Jul 27, 2023).

7 Australia: Refugee Review Tribunal "Country Advice Zambia", above at note 3.

8 I Malambo "The Zambian Tonga People" (Jul 20, 2021) *The Heritage Call*, available at *https://theheritagecall.com/the-zambian-tonga-people/* (last accessed Jul 27, 2023).

that chiefs, customary law, and cultural traditions enjoy.[9] Nevertheless, it also held that the actions of the respondent contravened both article 19 of the Constitution and Zambia's international human rights obligations. The petitioners had been denied their freedom of conscience, and the respondent did not have the authority to compel the petitioners to take part in the Lwiindi ceremony or to make this a condition precedent for their continued residence in his chiefdom. The court observed that the respondent erred in inflicting hardship on the petitioners by disbanding their village, as this made it difficult for them to obtain documents such as licenses, national registration cards, and passports, all of which require an address, the name of the chief, and the name of the village.

The court recognised that by ratifying a treaty, Zambia accepted the solemn responsibility to apply the obligations embodied in the treaty and to make national laws compatible with its treaty duties. The court accepted that Zambia must not act in a manner inconsistent with its international treaty obligations. Although not referred to in the decision, this finding is consistent with article 18 of the Vienna Convention on the Law of Treaties, which Zambia signed but did not formally ratify. It also respects the recognized principle of international law *pacta sunt servanda* (agreements must be kept).[10] The relevant provisions in the international treaties are similar in wording to that of the Constitution of Zambia, and therefore, the respondent's actions conflicted with both the Constitution and international obligations. The court appropriately elevated freedom of conscience, belief, and religion by recognising that these rights are internationally protected and not limited to only domestic guarantees by the State of Zambia.

The court left no doubt that the right to freedom of conscience, belief, religion, and opinion are fundamental rights guaranteed to the minority within the tribe by the State of Zambia and that the respondent, in his capacity as a tribal chief, had no lawful authority to limit these.

Overview of *Banda and Mwale v Lemmy Phiri*[11]

The second case under discussion is *Banda and Mwale v Lemmy Phiri*. The petitioners and the respondent belong to the Chewa-speaking people of Eastern Province, Zambia. Like the Tonga, the Chewa also form part of the people of the Bantu group. In Zambia, they mostly occupy the eastern region of the country.[12] The Chewa are also found in Malawi and Mozambique. Although separated by national boundaries, the Chewa people of Zambia, Malawi, and Mozambique have one paramount chief, or king, who is known as Kalonga Gawa Undi.[13]

The Chewa are typically organised into villages headed by a village headman or woman, with an advisory council of elders.[14] The headmen are supervised by regional chiefs, or subchiefs, who are answerable to the paramount chief, Kalonga Gawa Undi. The Chewa living in traditional societies make their living through farming, although they are also known for their skills in different arts and crafts, hunting, and fishing.[15]

In the case under review, the petitioners, who coincidentally are also Jehovah's Witnesses, were attending a religious service at the same time a funeral was being held in their village. The village headman consequently sent six men to stop their religious meeting, but the congregants continued their religious programme and indicated that they would visit the village headman once the programme ended. The headman informed the petitioners that they had committed an offence by attending religious activities when a funeral was going on and that this would be dealt with by an *induna* (councillor).[16]

The *induna* fined the petitioners. They declined to pay the fine, as they believed they were acting within their legal rights and had broken no law, secular or customary. The *induna* reported this to the chief (respondent), who convened a council of 30 headmen. After the hearing, the respondent ruled that the land allocated for the petitioners' religious worship would be repossessed and that the petitioners would be banned from holding religious services. He ordered that if congregants did not cooperate with the 30 headmen under his chiefdom, they would be expelled from their villages. Furthermore, he revoked the ownership rights on the religious property. Any headman who allowed Jehovah's Witnesses to congregate for religious worship would jeopardise his position as headman. The petitioners were forced to meet in private homes because of the hostile environment that prevailed.

The petitioners moved the High Court of Zambia, seeking, *inter alia,* a declaration that the acts of the respondent chief violated their freedom of conscience, belief, and religion. The petitioners relied on articles 11(b) and 19 of the Constitution of Zambia. The Court considered the powers and functions of a chief pursuant to the Zambian Chiefs Act[17] as prescribed under section 10, and found that any functions he exercised under African customary law are subject to the Constitution and any

9 As defined in the Constitution of Zambia 1991, as amended by Act 2 of 2016. See also "Zambia, Customary Law, Gender and Land Rights Database", *Food and Agriculture Organization of the United Nations*, available at: *https://www.fao.org/gender-landrights-database/country-profiles/countries-list/customary-law/en/?country_iso3=ZMB* (last accessed Jul 27, 2023).

10 Zambia signed but did not formally ratify the Vienna Convention on the Law of Treaties on May 23, 1969 which entered into force on Jan 27, 1980 (United Nations Treaty Series, vol 1155, at 331).

11 *Banda & Mwale v Phiri* (May 16, 2018), 2014 HP/218 (High Court of Zambia).

12 Britannica, The Editors of Encyclopaedia "Chewa" (Jun 1, 2017) *Encyclopaedia Britannica*, available at *https://www.britannica.com/topic/Chewa-people* (last accessed Jul 27, 2023).

13 M Katona, 'An Introduction to Malawi's Chewa People' (May 12, 2018) *The Culture Trip*, available at *https://theculturetrip.com/africa/malawi/articles/an-introduction-to-malawis-chewa-people/* (last accessed Jul 27, 2023).

14 Britannica, The Editors of Encyclopaedia, 'Chewa', supra note 12.

15 S Brown, 'Zambian Cultural Heritage - Chewa People - Their History and Culture' (Jun 11, 2009) *Ezine Articles*, available at *http://EzineArticles.com/2464568* (last accessed Jul 27, 2023).

16 Regarding the structure of villages within Zambia, see The Registration and Development of Villages Act, Ch 289, The Laws of Zambia.

17 The Laws of Zambia, Ch 287.

other written law, natural justice, and morality.[18]

As a result, the court found that the respondent's actions contravened the Constitution. The court acknowledged that freedom of conscience and religion are not absolute rights; they are subject to limitations clearly outlined under article 19(5). Although section 11 of the Chiefs Act empowers chiefs to maintain public order, there was no evidence that the petitioners' religious worship caused any breach of peace under the limitations in article 19(5). Further, the court ruled that the *induna*'s action in fining the petitioners was *ultra vires* of any statutory or constitutional authority. The court directed that the respondent chief refrain from interfering with the petitioners' religious activities and that the congregants' right to build a place of worship on the land they had been allocated be respected.

Law and conventions

In these decisions, the High Court of Zambia addressed the interplay between traditional, or customary, law and internationally recognised constitutional human rights. In doing so, the court harmonised its decisions with the most recent decisions of the highest courts of other countries that are facing similar conflict of law issues, as will be seen below.[19] As a result, the rulings shed light on how to preserve the co-existence of minorities within minorities in the same community when groups have divergent beliefs.

In both cases, the court began with the constitutional foundation of freedom of worship. The Constitution of Zambia identifies this right in articles 11 and 19. The highest courts of most countries have recognised the need to create a wall of judicial protection of this fundamental human right. In spite of this, freedom of religion is frequently under attack, as is evident from the two cases under discussion. When this occurs, courts are entitled to rely on the Constitution as well as on international human rights instruments ratified by their country, such as the UDHR, the ICCPR, and the Banjul Charter.[20] That is what the two courts did in the cases under discussion.

Analysis

In *Fungwe,* the court specifically referred to the UDHR, the ICCPR, and the Banjul Charter, noting that fundamental constitutional rights may not be hindered by anyone, save for the limited exceptions provided for in law. An individual has the right to freely practise the religion of his or her choice and should not be compelled to alter or conceal such choice because of any external factors in society.

In *Banda,* the court stated that freedom of religion and belief is subject only to limitations designed to ensure that the enjoyment of the said rights and freedoms does not prejudice the rights of others. The limitation is not in respect to the belief but, rather, to the manifestation of the belief, which is the second facet of this right. This two-faceted aspect of the right to freedom of religion makes its enforcement and protection one that requires judicial flexibility.

The common denominator in both rulings is that although local community authorities have an expansive autonomy pursuant to regulations and customary law, it is not unlimited. They may not trespass upon the fundamental human rights of those living within their territories. This is no different from the obligations of the State itself, which is obligated to protect human rights, both constitutionally and by international treaty. To take an extreme hypothetical example, regardless of how valuable a customary law or tradition is, it would never be allowed to countenance human sacrifice.

Courts in Africa are frequently challenged to balance the collective rights of tribal communities with constitutionally guaranteed rights of individual citizens. Such judicial protection is imperative when conflict of law issues arise in jurisdictions such as Zambia, where chiefs wield extensive control and power over their subjects. The Constitution is the supreme law in Zambia (see article 7). Part XII of the Constitution guarantees the institution of chieftaincy, and article 169(5) details the functions of chiefs. In *Banda,* the court also considered the functions and powers of the chiefs under sections 10 and 11 of the Chiefs Act. The court concluded, albeit in *obiter*, that the chiefs are constrained to their statutorily assigned roles and are subordinate to the overriding constitutional rights of those in their charge. This determination places the powers and functions of chiefs firmly under, and therefore subject to, the Constitution of Zambia.[21]

Will this ruling have a practical effect on the chiefs? The argument as to whether judicial sanctions deter wrongful conduct is as old as the judicial system itself; it is a well-worn axiom that no punishment has ever possessed enough power of deterrence to prevent the commission of crimes. While this may be true with respect to criminal conduct, it should not apply in noncriminal situations where freedom of religion is interfered with by the wrongdoer. Unlike criminals, persons who routinely disregard freedom of religion are those with petty authority. This threat was eloquently expressed in the well-known dictum of US Supreme Court Justice Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[22] A criminal usually does not consider in advance whether his next action is a crime, but the local chief or government official

[18] For an explanation generally on the interaction of customary law and property rights, see M Ndulo, 'African customary law, customs and women's rights' (2011) 18:1 *Indiana Journal of Global Legal Studies* at 87.

[19] Discrepancies/gaps between statutory and customary laws. For a discussion on the discrepancy, see *Zambia, Customary Law, Gender and Land Rights Database*, supra note 9.

[20] UDHR, art 18.

[21] The Mexican Supreme Court of the Nation recently reached the same conclusion in *Chino & Others v Tuxpan de Bolanos* (Jul 8, 2020), Amparo en Revision 1041/2019. See discussion of this important decision in Cisano, Ortiz & Tapia, 'The obligation of indigenous communities to subject their self-determination to the Mexican Constitution' (2022) 14:31 *Praxis de la Justicia Fiscal y Administrativa* at 26.

[22] *West Virginia State Board of Education v Barnette* (Jun 14, 1943), 319 US 624.

who interferes with religious freedom has the ability to obtain advice and, by virtue of his position, is presumed to know what constitutes unlawful action. Judicial findings can therefore provide strong and compelling deterrence.

The power of courts to make consequential orders[23] is also vital in giving strength to court findings and orders. While judicial restraint may be urged and ought to be exercised in cases addressing contractual rights, greater leeway should be given to courts where fundamental human rights are in issue. *Fungwe* provides an example of a court that could have made a consequential order even when not sought by the petitioners. The court found that the respondent had revoked the citizenship of the petitioners and made it difficult for them to obtain documents such as licences, national registration cards, and passports, which require an address, the name of the chief, and the name of the village. They were stripped of their landholding and ostracised by members of the community, who were afraid to talk to them.

In addition to declaratory orders, the interests of justice would have been better served had an order been made that reconstituted the disbanded village, reinstated the petitioners as members of that village, granted them back their citizenship rights to identification documents by all agencies, and restored their landholdings. A declaratory order means a ruling that is explanatory in purpose. It is designed to clarify what before was uncertain or doubtful, and it constitutes a declaration of rights between parties to a dispute, binding them as to both present and future rights.[24] An order restraining the chief from further interference with the petitioners' freedom of worship could have repaired the infringement on their rights and made them feel safe to return to and reintegrate into the community.

These consequential powers were available to the court in *Fungwe*, under article 28(1) of the Constitution.[25] The Supreme Court of Zambia affirmed the wide powers of the High Court to make consequential orders for breach of the provisions contained in articles 11 to 26 of the Constitution.[26]

Role of international law

In *Fungwe,* the High Court observed that "when a State ratifies one of the covenants (and Zambia has ratified a number) it accepts a solemn responsibility to apply each of the obligations embodied therein to ensure the compatibility of their national laws with their international duties in a spirit of good faith."[27]

The Ratification of International Agreements Act 34 of 2016 came into force on June 6, 2016, codifying the procedure for ratification and domestication of international treaties by Zambia. The Supreme Court of Zambia has noted that treaties Zambia has signed are merely persuasive unless formally adopted in domestic law. Prior to the enactment of Act 34 of 2016, the process of confirming domestication was not clearly codified, and the customary process of domestication ought to have been followed.[28] Zambia, being a dualist country, has domesticated the treaties that have a spirit and content similar to those of its Constitution. International treaties, cited in the decisions under discussion, can be said to be binding and not just persuasive in nature in determining common questions of law.

The wording of the High Court lends itself to a purposive interpretation of the Constitution and its provisions. The court rejected a cloistered reading of the law in favour of an expansive and interrelated acknowledgement of the pluralistic nature of the global discourse on human rights. By ignoring any technical omission in the process for domesticating international treaties, the court properly recognised that Zambia assumed an obligation to respect ratified treaties by incorporating the principles and wording in its Constitution. The Constitution of Zambia was enacted long after the UDHR was adopted in 1948, and clearly reflects its influence.

No state ought to conduct itself in a way that is inconsistent with, or undermines, the purpose of a treaty it has signed.[29] The signing of a treaty is a clear indication before the comity of nations of the willingness of a State to apply the principles set out therein. Any delay between the signing and ratification of a treaty ought not to be construed as abandonment of the treaty but, rather, as the result of formal requirements for ratification and domestic political realities. Thus, even without ratification of human rights treaties, Zambia should respect and enforce the rights protected by the treaties. Indeed, such local enactments that heavily borrow the wording of international instruments can be described as tacit, or indirect, treaty ratification.

The application of international human rights laws in resolving a dispute between tribal or customary laws is not unique to the African continent, as was recently shown in two cases decided by the highest courts of Mexico and Ecuador, whose facts are similar in principle to *Fungwe* and *Banda*. The courts reiterated the need to balance the collective rights of indigenous communities with the rights of minority groups within the indigenous communities. In each case, the minorities were indigenous Jehovah's Witnesses. The American courts reached the same conclusion as the Zambia courts, employing the same balancing principles.

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23 A consequential order is an order that gives effect to a judgment. It gives meaning to a judgment. It is traceable or flowing from the judgment prayed for and made consequent upon reliefs claimed by the plaintiff. See, 'On The Nature And Purpose Of A Consequential Order' *Lawyers Online (Legal Principles).*

24 E Suwilanji, L Linyama, M Chileshe, M Undi, 'Litigation & Dispute Resolution Laws and Regulations Zambia' (Feb 10, 2022) *ICLG*, available at *https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/zambia* (last accessed Jul 27, 2023).

25 Zambia Constitution, art 28(1), as amended by Act 18 of 1996.

26 *Resident Doctors Association of Zambia and Others v The Attorney General* (Sep 26, 2002 and Oct 28, 2003), Judgment 12 (Supreme Court of Zambia).

27 *Fungwe v Muntanga,* above at note 1 at 35. See the Vienna Convention on the Law of Treaties and the principle of international law *pacta sunt servanda* (agreements must be kept) as to the applicability of international treaties in the domestic context, above at note 10.

28 *The Attorney General v Clarke* (Jan 23, 2008), Appeal 96A/2004 (Supreme Court of Zambia).

29 *Fungwe v Muntanga*, supra note 1.

In *Chino v Jalisco,*[30] appellant Jehovah's Witnesses were forcibly evicted from their homes, their children expelled from school, and their property destroyed for not participating in certain indigenous religious celebrations. The appellants brought an action against indigenous authorities and both federal and state officials for failing to protect them. In its judgment, the Supreme Court of the Nation (Mexico) balanced the indigenous community's right to autonomy with the rights of the indigenous minority of Jehovah's Witnesses to continue to enjoy their rights and status as indigenous persons. It found that the human rights of the petitioners to due process, personal integrity, protection of the best interests of their children, along with their entitlement to indigenous sustenance and education, had been violated. The court stated:

In conclusion, we find unconstitutional the traditional rule that states that 'when a person in the community ceases to be a community member for reasons in connection with refusing to participate in the religion and customs of the community, pursuant to the Community's Charter, that person may be evicted from the community and the territory it occupies.' The traditional authorities should have chosen the alternative of relocating the persons within the community's territory, thus accomplishing the objective of protecting the community's right to self-determination and survival, while not jeopardizing Petitioners' right to a minimum level of subsistence.[31]

Significantly, the court applied international human rights treaties, ratified by the federal State of Mexico, within indigenous communities. It ruled that if the indigenous authorities failed to protect the rights of the indigenous minority within the community, the minority is entitled to the protection of the State regardless of any indigenous, tribal, traditional, or customary law. This ruling significantly advanced the law protecting the minority in the indigenous community. It is anticipated that if there is any further litigation on this issue, the court is now poised to reconsider whether the enforcement of the *Chino* decision could itself occasion further human rights violations. This is because the court unfortunately directed as a remedy the relocation of these victims, who were therefore compelled to abandon their homes and to move to other areas of the territory merely for having beliefs not held by the majority. Fortunately, another Latin American court addressed the issue more fully.

In *Ilumen,*[32] the Constitutional Court of Ecuador considered the constitutional issues raised by a group of indigenous Jehovah's Witnesses. The community authorities had stopped the building of a place of worship that had received all the necessary construction permits. The court based its conclusion on the constitutional guarantees of "the right to practice, maintain, change, profess, in public or private, their religion or beliefs, and to disseminate them, individually or collectively, subject to any restrictions required by respect for rights."[33]

The court concluded that preventing the construction of a place of worship infringed "the Witnesses' ability to profess their religion in public or private, and to preach their beliefs, within the private property they had designated for that purpose."[34] Preventing construction of their place of worship constituted religiously based discrimination, which is expressly prohibited under the Constitution of Ecuador.

The court directly addressed the need to balance the collective religious freedom of indigenous communities with the individual religious rights of minorities within indigenous communities. Collective rights must be exercised in a way that respects individual religious rights. A means to coexistence should be established in the midst of various religions, beliefs, and cultures. This mirrors the decisions in Zambia and Mexico, but goes beyond both by affirming that indigenous communities must respect the rights of minorities within them; if they fail to do so, the courts can act to protect the vulnerable minority.

Conclusion

Fungwe and *Banda* set important precedents, which now form part of the law of Zambia. Decisions of the Zambian superior courts of record bind lower courts, while decisions of other courts are only persuasive, although they may be referred to in formulating judgments. The *Fungwe* and *Banda* cases may be cited in similar jurisdictions for their persuasive value.[35] Courts should preserve and protect internationally recognised fundamental human rights. Customary law must be respected, but it is subordinate to the Constitution and international human rights instruments. Although European courts are not bound by precedent in the same way as common-law jurisdictions, such as Zambia, they have for many years recognised the necessity of analysing State action in the light of binding human rights conventions.[36] The recent cases (referred to above) in the highest courts of the Americas, also show the universality of human rights and the importance of balancing the exercise of tribal and cultural customs with internationally recognised human rights, such as the rights to freedom of religion and conscience. The Zambian courts are to be commended for taking the lead on the African continent by their decisions balancing customary law with upholding fundamental rights. The need to make consequential orders by courts for the enforcement of the fundamental rights of minorities, where appropriate, remains.

[Daniel Pole is a lawyer based in Ontario, Canada. This article is based on a presented made by him at the 24th Commonwealth Law Conference held in Malta on 6-10 March 2025.]

30 *Chino & Others v Tuxpan de Bolanos*, supra note 21. For a full discussion of this decision, see Cisano, Ortiz, & Tapia *The obligation of indigenous communities to subject their self-determination to the Mexican Constitution*, supra note 21.

31 *Chino & Others v Tuxpan de Bolanos*, supra note 19 at 80.

32 *Religious Freedom and Collective Rights Decision* (Aug 11, 2021) 1229-14-EP/21 (Constitutional Court of Ecuador).

33 ibid at 23 para 90.

34 ibid at 25 para 104.

35 AS Magagula "The law and legal research in Zambia" (October 2009) *Hauser Global Law School Program*, available at: https://www.nyulawglobal.org/globalex/Zambia.html (last accessed July 27, 2023).

36 *Kokkinakis v Greece* ECHR (May 25, 1993), Ser A 260-A, §31; *Dimitras & Others v Greece* ECHR (June 3, 2010), 42837/06 and 4 others; *Association for Solidarity with Jehovah's Witnesses and Others v Turkey* ECHR (May 24, 2016), 36915/10 and 8606/13.