Privy Council Appeal No 53 of 2008

1) Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc

(2) Satnarayan Maharaj

(3) Islamic Relief Centre Limited

(4) Inshan Ishmael *Appellant*

v.

The Attorney General of Trinidad and Tobago *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

- - - - - - - - - - - - - - - - -

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 28th April 2009

- - - - - - - - - - - - - - - - -

Present at the hearing:-

Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

- - - - - - - - - - - - - - - - -

*[Delivered by **Lord Hope of Craighead**]*

1. By Letters Patent dated 26 August 1969 a society of honour was established by Her Majesty the Queen in Trinidad and Tobago by and with the advice of the Cabinet. Its purpose was to accord recognition to

citizens of Trinidad and Tobago and other persons who had rendered distinguished or meritorious service or for gallantry. It was to be known as the Order of Trinity. The highest award was to be the Trinity Cross of the Order of Trinity. Except for the Victoria Cross and the George Cross, it was to take precedence over all other decorations. The other awards, in descending order of importance, were to be the Chaconia Medal, the Humming Bird Medal and the Medal of Merit. The Letters Patent were gazetted on 6 September 1969. Thereafter a National Awards Committee for the Order was set up as provided for by the Constitution for the Order set out in the Schedule to the Letters Patent, nominations were received and awards began to be made.

2. The Cabinet's decision to advise Her Majesty that the Order should be established was taken on the advice of a Committee that was set up in 1963 to make recommendations on national awards. It collected data on national awards from the United Kingdom, from emergent countries of the Commonwealth and from the United States of America. The nation of Trinidad and Tobago is a multi-cultural and multi-racial society. So the Committee also sought the views of, and held discussions with, various religious and other organisations. It was on its recommendation, after having taken all these steps, that the name of the Order and of its highest award was chosen. But questions soon began to be raised about the propriety of the Trinity Cross as the nation's highest award. It was perceived by Hindus and Muslims living in Trinidad and Tobago as an overtly Christian symbol both in name and in substance.

3. In February 1997 the National Awards Committee was asked to examine the national awards system after public consultation. Its Chairman was Michael de la Bastide, then Chief Justice of Trinidad and Tobago. It acknowledged that the highest award had attracted negative criticism, especially as the word "Cross" was perceived by many to be a Christian symbol. It noted that the word "Trinity" too might be regarded as a Christian reference, although that objection if taken to its logical conclusion would mean that the country's name would also have to be changed. A majority of the Committee favoured a change of name to the Order of Trinidad and Tobago. No immediate action was taken on the publication of its report.

4. On 16 November 2004 the appellants applied by way of a constitutional motion in the High Court for various declarations to the effect that the Trinity Cross of the Order of Trinity discriminated and continued to discriminate against them and others who are not Christians, contrary to sections 4(b), (d) and (h) of the Constitution of the Republic of Trinidad and Tobago. On 26 May 2006 the trial judge, Jamadar J, held that, but for the savings clause for an existing law in section 6(1) of the

Constitution, the appellants were entitled to a finding that their constitutionally guaranteed rights to non-discrimination on the basis of religion and to equality and equal treatment by law and administrative action had been and continued to be breached by the creation and continuation of the award of the Trinity Cross. As he explained at p 76 of his judgment, he located the infringement of heads (b), (d) and (h) of section 4 through the conjoint effect of those provisions. But he declined to make the declarations that the appellants had asked for. This was because in his opinion the Letters Patent establishing the Constitution of the Order of Trinity and the Trinity Cross must be deemed to be existing law, so they could not be invalidated on the ground of their inconsistency with the rights and freedoms declared in section 4. He dismissed the action and held that each party must bear its own costs. On 20 December 2007 the Court of Appeal (Hamel-Smith CJ (ag), Warner and Archie JJA) dismissed, with costs, the appellants' appeal against the decision of the trial judge. It is against that decision that the appellants now appeal, with leave of the Court of Appeal, to their Lordships' Board.

The issue before the Board

5. Before the Court of Appeal the State did not challenge the trial judge's findings that the award of the Trinity Cross infringed sections 4 (b), (d) and (h) of the Constitution. On the contrary, as Hamel-Smith CJ (ag) noted at the outset of his judgment, it has taken steps to have the award replaced. A Committee was appointed to review all aspects of the award of the Trinity Cross. On 17 April 2008, having considered a follow-up report of the Committee, the Cabinet agreed that the name of the highest national award should be The Order of the Republic of Trinidad and Tobago, that the name of the Society to replace the Order of the Trinity should be The Distinguished Society of Trinidad and Tobago, that the highest national award should be re-designed so as to replace the Cross with a Medal and that the Letters Patent should be amended to give effect to those decisions. The question whether the award of the Trinity Cross was discriminatory in the respects found by the trial judge is therefore no longer in issue.

6. The issue which their Lordships have been asked to consider is whether the Letters Patent which established the Order of Trinity were part of the existing law of the Republic of Trinity and Tobago within the meaning of section 6(1)(a) of the Constitution of 1976. The appellants maintain that they have an interest to argue this point notwithstanding the decisions that have now been taken to replace the Trinity Cross. The respondent has not sought to argue the contrary, and their Lordships consider that he was right not to do so. It is clear that, but for his finding that the Letters Patent were part of the existing law, the trial judge would

not have dismissed the action but would have granted at least some of the declarations the appellants sought. Moreover, while the decisions that have now been taken have resolved the issue for the future, they do not alter the fact that, for as long as it continued to be the nation's highest award, the Trinity Cross had been since its creation, for the reasons explained by the trial judge, discriminatory. The appellants are entitled to a declaration to that effect, if this is not precluded by the existing law clause.

The existing law provisions

7. Section 6(1)(a) of the Constitution of 1976 provides that nothing in sections 4 and 5, which enshrine fundamental human rights and freedoms and provide for their protection, shall invalidate "an existing law". "Existing law" is defined by section 6(3) of the 1976 Constitution as meaning a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution. "Law" is defined in section 3(1), which states that it "includes any enactment, and any Act or statutory instrument of the United Kingdom that before the commencement of this Constitution had effect as part of the law of Trinidad and Tobago, having the force of law."

8. The Constitution of the Republic of Trinidad and Tobago Act 1976 ("the 1976 Act") contains a number of transitional and savings provisions. Section 18 deals with enactments. The expression "enactments" has a narrower meaning here than the word "law" as defined by section 3(1) of the Constitution, as section 18 makes clear. It does not cover the same ground, as the meaning that is given to this expression for the purposes of section 18 is a qualified one. It states:

> "All enactments passed or made by any Parliament or person or authority under or by virtue of the former Constitution and not before the appointed day declared by a competent Court to be void by reason of any inconsistency with any provision of the former Constitution, including in particular sections 1 and 2 thereof, and that are not repealed, lapsed., spent or that had not otherwise had their effect, shall be deemed to have been validly passed or made and to have had full force and effect as part of the law of Trinidad and Tobago immediately before the appointed day, even if any such enactments were inconsistent with any provision of the former Constitution including in particular sections 1 and 2 thereof."

9. The expression "the former Constitution" refers to the Trinidad and Tobago Constitution set out in the Second Schedule to the Trinidad and Tobago (Constitution) Order in Council 1962 which was replaced by the 1976 Constitution when Trinidad and Tobago became a Republic on 1 August 1976. Sections 1 and 2 of the 1962 Constitution were the predecessors of what are now sections 4 and 5 of the Constitution of 1976. Section 22 provided for the establishment of Parliament, and section 36 conferred on it the power to make laws. Existing laws were preserved for the 1962 Constitution by section 4 of the Trinidad and Tobago (Constitution) Order in Council 1962. But the power to make laws for the colony that was vested in the Crown prior to the coming into force of the Constitution of 1962 was not preserved by it.

The approach of the courts below

10. The trial judge held that the Letters Patent establishing the Order of Trinity were made by Her Majesty under and by virtue of section 56(1) of the 1962 Constitution, which vested the executive authority of Trinidad and Tobago in Her Majesty, and that this included the exercise of the Royal Prerogative. But he rejected the appellants' argument that this was to be seen simply as an administrative or executive act beyond the reach of the existing law clause. In his opinion it was a legislative act which had the force of law. He said, at p 79 of his judgment, that it was a legitimate exercise of executive power, which included the power to create prerogative legislation with the force of law for the creation of honours.

11. The judge found support for this view in the official publication in the Laws of Trinidad and Tobago (LRO 1/2006) of the Letters Patent and the annotations accompanying it in the index of subsidiary legislation annexed to the Constitution of the Republic of Trinidad and Tobago Act, ch 1:01. He also had regard to the form, language and content of the Letters Patent themselves, which in his opinion suggested an intention to legislate. The annotations that accompany the publication of the Letters Patent in the annex state that they were originally issued by command of Her Majesty, had been modified in accordance with section 5 of the 1976 Act so as to be brought into accord with the Act and the Constitution and were deemed to be issued under section 6, which conferred power on the President of the Republic to do all things necessary for the exercise under any existing law of any prerogative or privilege vested in Her Majesty. Following *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, in which it was held that whether or not the law decreeing the mandatory death penalty was an infringement of the right to life or a cruel and unusual punishment it could not be invalidated for inconsistency with sections 4 and 5 because it was an existing law, the judge held that he had

no alternative but to apply section 6(1)(a) of the Constitution whatever his view might be about the legitimate or ethical underpinning of the continued existence of the Trinity Cross as the nation's highest honorary award.

12. It should be noted in passing that the statement in the annotations to the publication of the Letters Patent that they had been modified in accordance with section 5 of the 1976 Act which were mentioned by the trial judge may not be accurate. The Existing Laws Modification Order 1976, which was made by the President under section 5(2) of the 1976 Act and published in the Gazette on 2 September 1976, makes no reference to the Order of Trinity. The Letters Patent which established the Order appear to have been added to the Modification Order by the Law Revision Committee at a later date. It is not the function of the Law Revision Committee to alter the substance of the law: Law Revision Act, section 17(1). But, as their Lordships will show later, nothing turns on these points.

13. Delivering the judgment of the Court of Appeal, Hamel-Smith CJ (ag) said that he agreed with the appellants that the conferment of honours was an executive act. But it seemed to him that this argument appeared to disregard the source of the power to confer them, which lay within the Sovereign's prerogative powers and had the force of law as it was a power that was legitimately exercisable by the Sovereign. Although there was no provision to enforce the conferment of honours, the reality was that the Letters Patent conferred a power on the President to do something that he would not otherwise have been able to do on his own. He rejected the argument that nothing that the executive did could have legislative effect. In his view, the prerogative was an ancient form of law making which could fall within the exception of section 61 (1) which permits Parliament to make laws otherwise than by a Bill. His conclusion was that, while the power to confer honours was an executive one, it had the force of law which allowed it to qualify as "existing law" under the Constitution.

14. The critical question in both courts was seen to be whether the issuing of the Letters Patent was simply an executive or administrative act or was a means of making law in the exercise of the Royal Prerogative. It was assumed that, once it had been decided that this was a means of making law, there was no further room for argument. The honours system which the Letters Patent created must be taken to have been existing law when Trinidad and Tobago became a republic in 1976. The effect of the 1976 Constitution was plain. If existing laws are found to be inconsistent with the rights and freedoms that were declared in section 4, it will be for Parliament to provide the remedy: *Matthew v State*

of Trinidad and Tobago [2005] 1 AC 433; see also *Watson v The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472, paras 52-54. It was not suggested in either court that there might be a reason for examining the situation in 1969, which was the time when the Letters Patent were issued. The question which they did not address was whether the institution of the Trinity Cross as the nation's highest honour was compatible with the guarantees of equality, equal treatment and freedom of conscience and religious belief that were set out in the Constitution of 1962.

The compatibility issue

15. The same guarantees of equality, equal treatment and freedom of conscience and religious belief as those set out in sections 4(b), (d) and (h) of the 1976 Constitution were recognised and declared by section 1 of the Constitution of 1962. The opening words of section 2 of the 1962 Constitution, too, are to the same effect as section 5(1) of the 1976 Constitution. They provide:

> "Subject to the provisions of sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared…"

16. Section 3(1) of the 1962 Constitution provided that sections 1 and 2 were not to apply in relation to any law that was in force in Trinidad and Tobago at its commencement. Section 4 made provision for Acts passed during a period of emergency, and section 5 enabled Parliament to declare that an Act was to have effect notwithstanding sections 1 and 2, provided the final vote on the Bill in each House was supported by not less than four-fifths of its members. These exceptions do not apply to this case. The Letters Patent were not issued until 1969, so they did not have the protection of the existing law provision in section 3(1). Sections 4 and 5 plainly do not apply either.

17. In *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385, 396, the Judicial Committee said that, while section 3 eliminated any argument that anything done that was authorised by a law in force immediately before 31 August 1962 abrogated, abridged or infringed any of the rights or freedoms recognised or declared in section 1, it did not legitimise for the purposes of section 1 conduct which infringed any of the rights and freedoms there described and was not lawful under the pre-existing law. The protection which the recognition of those rights and freedoms afforded was against contravention of those

rights or freedoms "by the state or by some other public authority endowed by law with coercive powers": see also *Thornhill v Attorney-General of Trinidad and Tobago* [1981] AC 61, 74. On the other hand if the creation of the Order of Trinity by the Letters Patent was an enactment made under or by virtue of the former Constitution, as the respondent submits, the creation of the Trinity Cross of the Order of Trinity will fall to be treated as valid under section 18 of the 1976 Act notwithstanding any such incompatiblity. It was not declared by a competent court to be invalid before the date of its commencement.

The submissions

18. For the first and second appellants, Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc and Satnarayan Maharaj who represent the Hindu community, Sir Fenton Ramsahoye SC adhered to the argument that was presented below. In his submission the issue of the Letters Patent was an executive act. They were the evidence by which an executive decree was disclosed to the nation, and no more than that. It was not for Her Majesty to legislate for Trinidad and Tobago. When the country attained independence in 1962 this became, under its Constitution, the exclusive responsibility of its Parliament. Furthermore the award of honours was always, he said, an executive act on the part of the Sovereign. Mr Newman QC for the third and fourth appellants, the Islamic Relief Centre Limited and Inshan Ishmael who represent the Muslim community, also submitted that issue of the Letters Patent was an executive act, as it was done on the advice of the Cabinet and without the involvement of the legislature. But he presented an additional argument. He submitted that the validity of the issuing of the Letters Patent in 1969 must be judged by whether or not this act complied with the 1962 Constitution. On the judge's findings, this act breached the human rights provisions in the Constitution, and the appellants were entitled to a declaration to that effect under section 14(1) of the Constitution of 1976.

19. Mr Dingemans QC for the Attorney-General objected to the argument that the issue of the Letters Patent were invalid from the outset being raised before the Board as the point had not been taken below. He said that it would not be a proper exercise of the appellate function for the Board to declare that the institution of the Trinity Cross was discriminatory in 1969. There was no finding by the trial judge that the provisions of the 1962 Constitution had been infringed, nor had it been suggested in either court that such a finding should be made. The judge's findings had been based on the situation as he saw it at the time of his judgment. The situation might well have been different in 1969 when the Cabinet advised Her Majesty in the light of the report it received from the Committee. The only question was whether the system that was created

by the Letters Patent was existing law for the purposes of the savings clause in the 1976 Constitution. For this purpose they were to be seen as part of the common law, as the issue of Letters Patent was a form of executive legislation made in pursuance of the Royal Prerogative.

20. A joint note was filed following the hearing of the appeal in which the parties made further submissions, particularly with reference to section 18 of the 1976 Act to which their Lordships' attention had not been drawn during the hearing and which was not mentioned in the courts below. For the appellants it was submitted that section 18 of the 1976 Act did not apply to the Letters Patent as, after the creation in 1962 of an independent legislature for the colony, there was no prerogative power left in the Crown to legislate. The creation of the Order of Trinity was an executive act, which was permitted by section 56 of the 1962 Constitution. The respondent accepted that the granting of honours was not the making of ordinary laws. But it was submitted that this was nevertheless an enactment of the kind mentioned in section 18 as it was an act of executive prerogative legislation which had always been the preserve of the Crown. As such, the Letters Patent were validated by that section as an existing law for the purposes of the 1976 Constitution.

Section 18 of the 1976 Act

21. Their Lordships must deal first with the respondent's argument that section 18 of the 1976 Act applies because the use of Letters Patent to establish honours is a form of prerogative executive legislation. The phrase "prerogative executive legislation", which was also adopted by the trial judge, is not a term of art. It does not have the weight of authority behind it. Nor is it among the expressions used in the 1976 Act and the Constitutions of 1962 and 1976. It has been adopted for the purposes of the respondent's argument as a convenient label to distinguish this form of law-making from the power to make ordinary laws under the general legislative power that, under the 1962 Constitution, belonged exclusively to Parliament. It combines within it the concepts of an act of law-making and something that is done in the exercise of the prerogative power independently of Parliament. But the very fact that the words "executive" and "legislation" are put together in this way indicates that it is a hybrid creature, whose precise character requires further analysis. Attaching this label to the issue of the Letters Patent does not solve the crucial question that has to be answered. The question is whether their issue, however one describes it, was an "enactment" of the kind that is contemplated by section 18 of the 1976 Act – an enactment that was made under or by virtue of the Constitution of 1962.

22. The fact that the Letters Patent were issued under the Royal Prerogative does not resolve the question whether this was an enactment either. It is commonplace for appointments to senior positions to be made by Her Majesty by the issue of Letters Patent. These, plainly, are executive acts only. Section 23 of the Constitutional Reform Act 2005, which provides that Her Majesty may by Letters Patent appoint one of the judges of the Supreme Court of the United Kingdom to be President and one to be Deputy President is one example. There are many others, including appointments to the rank and dignity of Queen's Counsel. This does not exhaust the purposes for which Letters Patent may be issued. The Prerogative in its original form enabled the Sovereign to do all manner of acts, including that of legislating. Although much restricted, that power survives to the present day. In this case, however, the context requires a more precise analysis of how the act that was performed in this case ought to be characterised. It cannot be detached from its constitutional and colonial background.

23. Sir Kenneth Roberts-Wray, formerly Legal Adviser to the Commonwealth Relations Office and the Colonial Office, described the nature and use of Letters Patent in the Commonwealth context in his book *Commonwealth and Colonial Law* (1966). At p 143 he discussed the various legislative and executive powers possessed by the Sovereign derived, directly or indirectly, from the Prerogative. The use of Letters Patent, he said, is the instrument by which offices are created and powers relating to various matters such as the appointment and dismissal of officers are delegated to the holders of such offices. This description of their use suggests that, for some purposes, the use of Letters Patent may indeed assume a legislative character. At p 144 he said that there is little distinction of substance between Orders in Council and Letters Patent, at any rate in the case of a ceded or conquered colony in which the Crown's legislative power remains intact. Here too is an indication that Letters Patent may be used for a legislative purpose. Their availability for this purpose is consistent with the nature of the Royal Prerogative under which they are issued. Dicey described it as nothing else but the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown: *Law of the Constitution*, 10th ed (1959), p 424.

24. In *Principles of Australian Public Law* (2003), para 8.24, Professor David Clark, describing the prerogative powers that still exist in Australia, says that they take two forms, one of which he refers to as legislation:

> "First, several of the Governors of the States and the Governor-General of Australia are appointed under the

> Royal Prerogative. Their offices are, in most cases, created by a prerogative legislation called the Letters Patent."

The use of Letters Patent as a form of legislation within the accepted procedures of rule-making in a democratic society is also discussed in a Research Note prepared by the Department of the Parliamentary Library of the Commonwealth of Australia. After referring to Acts of Parliament and delegated legislation, the author, Roy Jordan, states:

> "Outside of these well known methods of law making stands legislation made under Letters Patent, also known as prerogative instruments, and includes legislation setting out procedures for granting honours and awards which are made without parliamentary scrutiny and have practically no review procedures."

25. These references provide some support for the respondent's argument. But they do not address the question whether this was an enactment of the kind referred to in section 18. The question whether an executive act that takes the form of the issue of Letters Patent is an executive act pure and simple or is an act of a legislative character seldom requires to be inquired into. Normally it is a matter of no importance at all to analyse its precise character. This is not so where the issue of Letters Patent must be subjected to scrutiny under the 1976 Constitution's existing law clause. That the exercise of the prerogative is open to scrutiny in this way is not in doubt. The question is whether a decision as to the legitimacy of its exercise in this case is pre-empted by the validity that section 18 of the 1976 Act accorded to existing enactments.

26. Section 18 applies to "enactments passed or made by any Parliament or person or authority under or by virtue of the former Constitution". The phrase "person or authority" is wide enough to apply to things done by Her Majesty in the exercise of the Prerogative. But did the 1962 Constitution authorise her to make enactments as part of the law of Trinidad and Tobago? And, if it did, was the creation of the Order of Trinity by the issue of Letters Patent an "enactment" within the meaning of section 18? Was it for the purpose of legislating under or by virtue of the Constitution that the prerogative was exercised?

27. The general principle is that, if the Crown grants ~~to~~ a representative legislative body to a conquered colony without reserving to itself power to legislate, the power to legislate under the prerogative is no longer exercisable. In *Campbell v Hall* (1774) 1 Cowp 204, where the Governor General of Grenada had been authorised by Letters Patent to establish a legislature, it was held that the King had precluded himself from the

exercise of legislative authority over the island. In *Re the Lord Bishop of Natal* (1865) 3 Moo PC 115 it was held that, after the creation of an independent legislature in the Cape of Good Hope and Natal, there was no prerogative power to establish ecclesiastical authorities with coercive authority whose status and powers the colony could be required to recognise. This was not something that could be done without an Act of Parliament. In *Sammut v Strickland* [1938] AC 678, 704 the Board said that the Crown was not deprived in these circumstances of the right to legislate irrevocably. But it confirmed that, as a general rule, such a grant without the reservation of a power of concurrent legislation precludes the exercise of the prerogative for this purpose while the legislative institutions continue to exist.

28. Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, pp158-159, offered further guidance on this point. He drew attention to the difference between what he described as the constituent power – the power to amend the constitution – and the ordinary legislative power to make laws for the peace, order and good government of the colony. He said that it did not follow from the grant of legislative authority to the local legislature that the Sovereign could not amend the constitution, or even revoke it, so long as the grant of legislative authority was preserved. In his view, the power to amend the constitution, including provisions relating to the office of Governor, belongs to the Crown, whether expressly reserved or not. But at p 162, having considered *Re the Lord Bishop of Natal* (1865) 3 Moo PC 115 and *Sammut v Strickland* [1938] AC 678, he said that there was a strong case for maintaining that, unless there is an express reservation to the contrary, the Crown does not possess a concurrent power to make ordinary laws so long as legislative institutions continue in the colony.

29. The respondent accepts that the effect of the 1962 Constitution was that the Crown lost the power to make ordinary laws for Trinidad and Tobago. In other words, to adopt the language of section 18 of the 1976 Act, Her Majesty was not able to make laws of that kind under or by virtue of the former Constitution. If the issue of the Letters Patent could be said to have been an enactment of the kind that was within the power that had been given exclusively to Parliament, it must follow that it was not authorised by the Constitution and that section 18 of the 1976 Act could not give it validity. But, says Mr Dingemans, the granting of honours is not the making of ordinary laws. He does not suggest that it is an exercise of the constituent legislative power that Roberts-Wray identified. That would not have assisted his argument. This is a power that belongs to the Crown. If exercised, it is exercised by the Sovereign on her own authority, not under or by virtue of the constitution that is affected by it. On Roberts-Wray's analysis of the powers of law-making

that the common law recognises, therefore, the creation of the Order was neither one thing nor the other. It was not an act of ordinary law-making, because the power to do that belonged exclusively to Parliament. And it was not an exercise of the constituent legislative power either. That does not exhaust the argument, however. The respondent now submits in his contribution to the joint note that the validity of what was done as an act of prerogative executive legislation depends on the true construction of section 57 of the 1962 Constitution.

30. Section 57(1) of the 1962 Constitution was in these terms:

> "There shall be a Cabinet for Trinidad and Tobago which shall have the general direction and control of the government of Trinidad and Tobago and shall be collectively responsible therefor to Parliament."

It was by and with the advice of the Cabinet that the Order of Trinity was established by Her Majesty. Constitutional validity was given in this way to its creation by the executive. But the authority to create the Order lay not with the Cabinet but with Her Majesty in the exercise of the prerogative. The Sovereign is the fountain of all honours in all territories of which she is Queen: Chitty, *Treatise on the Law of the Prerogatives of the Crown* (1820), pp 107-108. It was under and by virtue of the prerogative that this was done, by and with the advice of the executive. This is something that, as Roy Jordan says in his Research Note, is done without parliamentary scrutiny. In other words, the additional step of parliamentary scrutiny was not required for its validity.

31. A striking feature of this arrangement, indeed, is that the Cabinet did not seek the authority of the legislature. In *Re the Lord Bishop of Natal* (1865) 3 Moo PC 115, 148-150, the Lord Chancellor referred to examples of cases where the appointments of bishops by Letters Patent in various colonies were confirmed by Acts passed by the legislature. The fact that the Cabinet did not think that this was necessary for the establishment of the Order is not, of course, conclusive. But it is an indication that the act which was being performed was not something which had the character of what would ordinarily be called an enactment. This understanding of its nature can be supported by an examination of the Constitution for the Order in the Schedule to the Letters Patent. It was, of course, within the powers of Her Majesty to lay down the rules according to which the Order which she was creating was to operate, and it was desirable that she should do so for the guidance of the Governor-General. In that very restricted and unusual sense it was a kind of law-making. But there is nothing here to indicate that the award of any of the honours that were being created was to carry with it any kind of status or

coercive authority, such as that given to the bishops referred to in the *Natal* case, that required the force of legislation to support it.

32. Taking all these considerations into account, their Lordships are of the opinion that, while the issue of the Letters Patent may perhaps be described as an act of law-making because it was designed to set up a system for the Order, it was not an enactment of the kind described in section 18 of the 1976 Act. It was not something that was done under or by virtue of the Constitution. Authority to create the order lay with Her Majesty in the exercise of the prerogative. That being so, the Order's creation is not exempt from scrutiny as to whether it was incompatible with the equality provisions in the Constitution of 1962 before it can be treated as an existing law as defined by section 6(3) of the 1976 Constitution. For this purpose the word "law" has the wide meaning given to it by section 3(1). It "includes", as the definition puts it, "any enactment, and any Act or statutory instrument". It also includes anything else that has the force of law, of which the common law is the most obvious example.

The 1962 Constitution

33. Their Lordships consider that it is open to the Board to examine the question whether, assuming that it was "law" within the meaning of section 3(1) of the Constitution of 1976, the issue of the Letters Patent was incompatible with the equality provisions in the 1962 Constitution. They appreciate, of course, that there are limits to the extent to which it is open to a party to rely on arguments that were not deployed in the lower courts. The overriding consideration is that of fairness. In this case however the facts were explored by the trial judge in great detail in his long and careful judgment. The history of the development of the colony since its "discovery" in 1498, and its need for labour for the plantations when slavery was abolished, is fully set out. He records the arrival of the first East Indian ship, *The Fatel Razack*, in May 1845 and the growth of the number of Indian immigrants that followed that event. By 1871 East Indians made up 25 per cent of the population. By 1970 they made up 40 per cent, the majority of whom where either Hindu or Muslim. He also traces the slow progress that was made towards recognition that Trinidad and Tobago had become a multi-cultural and multi-religious society, not an exclusively Christian one.

34. Furthermore, the judge's conclusion that, given the experiences and religious beliefs of Hindus and Muslims, the Trinity Cross amounted to indirect discrimination against them was not confined to the situation at the date of his judgment. He states repeatedly that this was so from the date of its creation. At p 76 of the judgment he finds that its creation

came at a time after Independence when Trinidad and Tobago was already an established multi-religious society with a written Constitution in place (the 1962 Constitution) guaranteeing the same fundamental rights and freedoms as those under consideration through the perspective of the Constitution of 1976 under which the declarations were being sought. Had it not been for the saving of existing laws, he would have given serious consideration to the mandate to grant relief under section 14(2) of the 1976 Constitution to enforce, secure and protect the appellants' rights and freedoms which, as he put it, "have been abridged by the creation and continued existence of the award of the Trinity Cross."

35. The judge was not asked to consider whether the issue of the Letters Patent infringed the appellants' rights and freedoms under the 1962 Constitution. If the appellants' argument that this was simply an executive act and not law at all was sound an examination of that question would, of course, have been unnecessary. What they failed to do was to appreciate that, if they were wrong about this, and it was "law" within the meaning of section 3(1) of the Constitution of 1976, the question as to the validity of this act under the 1962 Constitution was still open to argument unless it must be taken to have been validated by section 18 of the 1976 Act. The existing law clause in the 1976 Constitution could not save a law, if that was what this was, which was invalid under the Constitution of 1962. This is not, however, something that their Lordships can disregard as they contemplate the situation that the judge's findings of fact have revealed.

36. By section 2 of that Constitution it was provided that "no law" shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights or freedoms recognised and declared in section 1. The effect of that provision is that a law which was at variance with the 1962 Constitution was incapable of being saved as an existing law under the Constitution of 1976 unless it was contained in an enactment within the meaning of section 18 of the 1976 Act. "Existing law" is defined in section 6(3) of the 1976 Constitution as "a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution." That definition cannot extend to a law within the meaning of section 3(1) which post-dated the commencement of the 1962 Constitution, was at variance with it at the time when it was made and is not validated by section 18 of the 1976 Act.

37. The days are long past when a King could declare, as King James VI of Scotland did in 1598 in his pamphlet entitled *The Trew Law of Free Monarchies or The Reciprok and mutual duetie betwixt a free King and his natural Subjects*, "The King is above the law, as both the author and

giver of strength thereto": *King James VI and I, Political Writings*, ed by JP Somerville (1994), p 159. In 1603 King James had also become King James I of England, and he carried with him his belief in an absolute monarchy. But in 1611 it was resolved by the two Chief Justices, upon conference with the Lords of the Privy Council, that the King had no prerogative but that which the law of the land allowed him: *Proclamations' Case* (1611) 12 Co Rep 74, 75. It is now well established that the courts have jurisdiction under the common law to inquire into the existence or extent of any alleged prerogative: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398E; *Halsbury's Laws of England* (4th ed, reissue), vol 8(2), para 368. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] 3 WLR 955, para 35, Lord Hoffmann said, with the agreement of all the other members of the Appellate Committee, that he could see no reason why prerogative legislation should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.

38. Mr Dingemans said that section 56(1) of the 1962 Constitution left it open to the Queen, within very narrow limits, to legislate by means of the Royal Prerogative. Their Lordships do not accept that the word "legislate" is a correct description of what this was. The Letters Patent do not have the general coercive force which is characteristic of an enactment. On the other hand, the meaning that section 3(1) of the 1976 Constitution gives to the word "law" is, as has already been observed, a wide one. It does not attempt a precise definition, so the word is left to embrace anything that is within the ordinary meaning of "law". Professor H L A Hart, *The Concept of Law* (1961), p 3 said that the question what this word means has given rise to a prolonged and somewhat sterile controversy. But in its simplest form it may be said to consist of a series of rules which forbid or enjoin certain types of behaviour under penalty, rules requiring people to compensate those whom they injure in various ways, and rules which specify what must be done to make wills, contracts or other arrangements which confer rights and create obligations. These rules exist in a legal system which has courts to determine what the rules are and give effect to them, and a legislature which enacts laws to create new rules and abolish old ones. That Her Majesty had power to create the Order of Trinity in the exercise of the prerogative is beyond question. As for whether this was "law", the Letters Patent did not just create the Order. They laid down rules which were to have continuing effect for its administration. This suggests that this was something more than an executive decision. The rules by which a private club or society regulates itself are not "law" in the usual sense of that expression. But there was a public aspect to the creation of the Order which indicates that rules of that kind do not provide a precise analogy.

39. Even if this was law making, one of the limits to any power to make law was set by the declaration in section 2(1) of the Constitution that no law was to authorise the abrogation, abridgement or infringement of any of the rights and freedoms declared in section 1. Full effect must be given to that declaration, and it applies as much to the use of the prerogative to create rules for the administration of a national awards system as it does to an enactment by the legislature. This means that it was not open to the Monarch, whether by the issue of Letters Patent in the exercise of the Royal Prerogative or otherwise, to act in a manner that was incompatible with the existence of the right to equality, the right to equality of treatment from any public authority and the right to freedom of conscience and religious belief. The effect of section 2(1) of the Constitution of 1962 was that the principle that was described in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385, 396 applied to the issue of Letters Patent, irrespective of the description that is given to this act.

Conclusion

40. The findings by the trial judge were directed to the rights and freedoms described in section 4(b), (d) and (h) of the Constitution of 1976. But they show just as clearly that the institution of the award of the Trinity Cross as the nation's highest honour was an infringement of the enjoyment of the rights described in sections 1(b), (d) and (h) of the 1962 Constitution from the date of its creation. The issue of the Letters Patent is not exempt from scrutiny as this was not an "enactment" within the meaning of section 18 of the 1976 Act. It was not an enactment in the wider sense either. It is not necessary to reach a concluded view as to whether this was an executive decision or was "law" within the meaning of section 3(1) of the 1976 Constitution because it was, as Hamel-Smith JA put it at p 10 of his judgment, an ancient form of law-making under the prerogative. Either way, it was an infringement of the rights and freedoms of members of the Hindu and Muslim communities in Trinidad and Tobago and it was unconstitutional. For this reason, notwithstanding the listing in the annex to the 1976 Constitution in the Laws of Trinidad and Tobago (LRO 1/2006), it is not entitled to the protection that section 6(1)(a) of that Constitution gives to an existing law.

41. For these reasons the appellants are entitled to a declaration that creation of the Trinity Cross of the Order of Trinity established by the Letters Patent given on 26 August 1969 breached their right to equality under section 4(b), their right to equality of treatment under section 4(d) and their right to freedom of conscience and belief under section 4(h) of

the Constitution of Trinidad and Tobago 1976. Their Lordships will allow the appeal and make a declaration to that effect.

42. But their Lordships cannot overlook the fact that it was not until November 2004 when these proceedings were brought that the appellants made any legal challenge to the constitutionality of this award. It was not until the hearing of this appeal by the Board that it was suggested that its constitutionality should be determined under the 1962 Constitution as at the date of its creation. The retrospective effect that normally attaches itself to a judicial declaration of the kind sought in this case is undesirable in these circumstances. So nothing in this judgment should be taken to apply to any awards of this high honour that were made under the system that the Letters Patent established before the date of the Board's judgment. For the avoidance of doubt their Lordships will make a declaration to that effect also.

Concurring Judgment by Lord Mance

43. Although I have had some doubt about the concept of an "enactment" under s.18 of the Constitution of the Republic of Trinidad and Tobago Act 1976, I am on consideration content that this appeal should succeed by the route indicated in the judgment of the Board prepared by Lord Hope of Craighead.

44. In my opinion, the appeal is also able to succeed by a shorter route, which is that the letters patent involved an executive act, capable of being declared unconstitutional in so far as it breached the applicants' rights under s.4 of the 1976 Constitution.

45. Nothing in the 1962 or 1976 Constitutions removes from the executive, in the form of Her Majesty until 1976 and the President thereafter, any non-legislative prerogative power which the Crown had before 1962. The creation of the Order of Trinity falls in my view into this category. True, the creation and conferring of honours may in some contexts give rise to rights and duties. Some ancient United Kingdom statutes deal with precedence and the United Kingdom Army and Air Force Acts regulate the wearing of certain medals. Questions arising of about precedence, descent, the right to bear a coat of arms and "other kindred matters of honour" are technically within the jurisdiction in England of the Court of Chivalry (held still to exist, after 200 years desuetude, in *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] 1 All ER 387) and in Scotland the Court of the Lord Lyon has a jurisdiction over the use of arms backed by criminal sanctions.

46. The Board was not referred to any equivalent legal consequences of the Order of Trinity in Trinidad and Tobago (or any equivalent jurisdiction capable of giving effect to them there). The establishment of such an order, with the grant of the entitlement to the holder to "(a) have the letters 'T.C.' placed after his name on all occasions when the use of such letters is customary; and (b) wear as a decoration the insignia prescribed by the President for recipients of the Trinity Cross", appears, of itself and in the absence of any apparent statutory under-pinning, to involve no legal rights or duties. The shame of exposure is probably as good as any other method of deterring and punishing those who assert unjustified honours or achievements of whatever nature.

47. The description, in the Australian publications to which the Board refers, of letters patent including procedures for granting honours and awards as "legislation" does not to carry matters far, when the same publications appear to treat all letters patent as "an ancient form of law making", yet cite, as authority for their issue, s.61 of the Australian Constitution, which is the section preserving the *executive* power of the Crown (and parallels in this respect s.56(1) of the 1962 Constitution and s. 74(1) of the 1976 Constitution of Trinidad and Tobago).

48. By way of footnote, I find it difficult to see how the Crown could in 1969 have retained any relevant prerogative legislative power to issue letters patent. Once the Crown exercises its prerogative power to grant a constitution to one of its territories, then, unless the constitution becomes for some reasons inoperable, the Crown no longer has the prerogative power to legislate which it had previously in respect of such territory: *Campbell v Hall* (1774) 1 Cowp. 204. Depending on the terms of the grant, it may retain the "constituent" power to replace or amend the constitution, but that is a different and presently immaterial matter.

49. In the case of Trinidad and Tobago, the Constitution introduced in 1962 by the Trinidad and Tobago (Constitution) Act 1962 was in the conventional "Westminster" style, with detailed provisions establishing a separation of the powers of Parliament (Chap. V), the Executive (Chap. V) and the Judicature (Chap. VI). Under Chap. V the executive authority of the territory was "vested in Her Majesty", while under Chap. III the Governor-General appointed by Her Majesty was to be Her representative in the territory.

50. If the letters patent involved law-making, they cannot I think have been an exercise of the "executive authority" vested in Her Majesty by Chap. V, s.56(1), of the 1962 Constitution. Second, where it was intended to preserve a royal prerogative having legal consequences, that was expressly provided in the 1962 Constitution: see Chap. V, ss.70 and 71-

72, providing for the continuing prerogative powers of pardon and mercy, etc. S.69 also gave the Governor-General power to constitute offices for the territory, and to make and terminate appointments to them. On the face of it, the 1962 Constitution is inconsistent with the continuation of any other prerogative power to make anything that could be described as law.

51. However, I do not think that this footnote needs pursuing. I agree that this appeal should succeed, and also that any declaration of unconstitutionality should be prospective only in effect for the reasons given in paragraph 41 of the Board's judgment.