TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. Cv. S. 2065/2004

IN THE MATTER OF THE CONSTITUTION OF
TRINIDAD AND TOBAGO

AND

IN THE MATTER OF THE GUARANTEES OF FUNDAMENTAL
HUMAN RIGHTS AND FREEDOMS PART 1 OF THE SAID
CONSTITUTION

AND

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL
HUMAN RIGHTS AND FREEDOMS PURSUANT TO SECTION
14 OF THE CONSTITUTION AND ORDER 55 OF THE
RULES OF THE SUPREME COURT

BETWEEN

SANATAN DHARMA MAHA SABHA OF
TRINIDAD AND TOBAGO INC.

SATNARAYAN MAHARAJ

ISLAMIC RELIEF CENTRE LIMITED

INSHAN ISHMAEL APPLICANTS

AND

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO RESPONDENT

BEFORE THE HONOURABLE MR JUSTICE P. JAMADAR

APPEARANCES
Dr. F. Ramsahoye Q.C., Mr. J. Horan and Mr. A. Ramlogan for the Applicants.
Mr. R. Martineau S.C. and Ms. D. Peake (now S.C.) for the Respondent.

JUDGMENT

INTRODUCTION

In 1962 Trinidad and Tobago attained Independence from England. No longer was Trinidad and Tobago a colony. However, Her Majesty the Queen of England remained Monarch.

By the Trinidad and Tobago (Constitution) Order in Council 1962, to which the 1962 Independence Constitution (the 1962 Constitution) was annexed and made operative (as from the 31st August 1962), Trinidad and Tobago was granted full responsibility for its own governance within the context of the Commonwealth (see the Trinidad and Tobago Independence Act, 1962). From that moment on, Trinidad and Tobago had independent responsibilities with respect to legislative powers and no laws of the United Kingdom passed after the 31st August 1962 would extend to Trinidad and Tobago as part of its laws. However, by section 22 of the 1962 Constitution the Parliament of the Independent Trinidad and Tobago consisted of Her Majesty, a Senate and a House of Representatives. And, by section 56 of the 1962 Constitution the executive authority of Trinidad and Tobago was vested in Her Majesty and could be exercised on Her behalf by a Governor General. Further, the Governor General was appointed by Her Majesty and held office at Her Majesty's pleasure and was Her Majesty's representative in Trinidad and Tobago and the Commander in Chief of Trinidad and Tobago (section 19 of the 1962 Constitution). Finally, by section 57 of the 1962 Constitution the establishment of a Cabinet was provided for, with responsibility for the control of the government of Trinidad and Tobago and with accountability for same to Parliament.

On the 26th August 1969 (with effect from the 30th August 1969) Her Majesty, Elizabeth The Second as Queen of Trinidad and Tobago, acting on the advice of the Cabinet of Trinidad and Tobago, issued Letters Patent establishing a society of honour in Trinidad and Tobago, to be known as the "Order of the Trinity," for the purpose of "according recognition to citizens of Trinidad and Tobago and other persons for distinguished or meritorious service or for gallantry."

Since the inception of the Order of the Trinity some thirty-five years have passed; and now a formal constitutional challenge has been raised against the highest honour that can be awarded under it: 'The Trinity Cross.' For many years prior to this challenge murmurings have been sounded about the propriety of The Trinity Cross, in a multi-cultural and multi-religious society such as exists and has existed in Trinidad and Tobago since the time of its introduction in 1969.

Since 1976, with the introduction of the 1976 Republican Constitution (the 1976 Constitution) and the creation of the Republic of Trinidad and Tobago (by Act No. 4 of 1976, the Constitution of the Republic of Trinidad and Tobago Act), the prerogatives and privileges formerly vested in Her Majesty were, as of the 1st August 1976, vested in the State (the Republic of Trinidad and Tobago) and, subject to the 1976 Constitution and any other law, the President (of the Republic) was given the power to exercise those prerogatives and privileges - section 6 (1) of Act 4 of 1976. By the 1976 Constitution the President had become Head of State and Commander in Chief of the armed forces (section 22) and executive authority for Trinidad and Tobago had also been vested in the President. Thus, the President had generally replaced Her Majesty and Her Majesty's appointee the Governor General in the roles they played under the 1962 constitutional arrangements that had previously existed in Trinidad and Tobago.

The Applicants in this case challenge the constitutionality of the Trinity Cross on the grounds that its continued existence and award are in breach of the Applicants' fundamental rights as guaranteed by sections 4(b), 4(d) and 4(h) of the 1976 Constitution.

The Applicants argue that as a Hindu and a Muslim and as representative organizations of Hindus and Muslims existing in a multi-cultural and multi-religious society like Trinidad and Tobago, with its unique religious, cultural, historical and sociological antecedents, the continued existence and awarding of The Trinity Cross as the State's highest national honorary award is discriminatory and unfair, in that Muslims and Hindus by virtue of their religious beliefs and experiences are unfairly and discriminately encumbered in their capacity to nominate persons for, be nominated for or accept the honour, because of its

clear and overt preferential recognition and representation of Christian symbolism, theology and values. It is essentially on these contentions that the arguments of discrimination and inequality arise, both independently and in the context of the fundamental right to freedom of conscience and religious belief and observance.

STRUCTURE OF JUDGMENT

1. The religious, cultural, historical and sociological context (pages 5 - 18).
    - ‘Discovery’ and colonization.
    - Christian exclusivity.
    - Indian arrivals.
    - Canadian Christian mission.
    - Marginalization.

2. The Trinity Cross (pages 18 - 42).
    - Recommendations.
    - Description.
    - Interpretation.
    - Victoria Cross.
    - George Cross.
    - Contemporary considerations.
    - Hindu perspectives.
    - Islamic perspectives.
    - The Applicants.
    - de la Bastide Committee.

3. Entitlement to relief, 1976 Constitution (pages 42 - 46).
    - Likelihood of contravention.
    - Locus standi.

4. The equality provisions, 4(b) and 4(d), 1976 Constitution (pages 47 - 65).
   - Legislation.
   - Administrative action.
   - Fairness.

5. Religious belief and observance, 4 (h), 1976 Constitution (pages 65 - 71).
   - The American position.
   - Secular State.
   - State involvement in religion.
   - Understanding 4(h) rights.

6. Synthesis/Application (pages 71 - 76).
7. Existing law, 6(1), 1976 Constitution (pages – 76-79).
8. Costs (page 80).
9. Disposition (page 80).
10. Appendices.

RELIGIOUS, CULTURAL, HISTORICAL, SOCIOLOGICAL CONTEXT

> And at the end of 17 days, during which the Lord granted me a favourable wind, on Tuesday July 31, at noon, land presented itself to our gaze. I had expected this the Monday before and had held the course up to this point, but as the fierceness of the sun increased and our supply of water was failing, I resolved to make for the Carib Islands, and I set sail in that direction. And as the Lord on high has always shown mercy to me, one of the sailors, a seaman from Huelva, my servant, named Alonso Perez, saw a range of three mountains to the westward, about 15 leagues distant … Whereupon there was great joy and merriment, and we recited the *Salve Regina* and gave thanks to the lord.

Ship's log entry by Christopher Columbus, 31st July, 1498.

The respected and reputable historians Michael Anthony, Gerard Besson and Bridget Brereton note (see First in Trinidad, 2nd Ed.; Historical Dictionary of Trinidad and Tobago, 1997 and The Book of Trinidad, 3rd Ed., at pages 21, 150 and 11 respectively), that Columbus on seeing this land remembered his vow on leaving the Spanish Mediterranean seaport of San Lucar on the 30th May 1498, to name the first land he saw

after the Blessed Trinity ("la santissima trinidad"), the three persons in One God according to the Roman Catholic faith – to whom he had dedicated this his third voyage to "the Indias" (the West Indies) and cried out **"La Trinidad!"**. The island was thus named "Trinidad" after the Holy Trinity of the Roman Catholic (Christian) religion.

From the 31st July 1498 until Capitulation on the 18th February 1797 (by "His Catholic Majesty" – the Spanish King to "His Britannic Majesty" – the British King) Trinidad was a Spanish Catholic colony.

One of the motives for the exploration of the New World by Columbus and Catholic colonizers was the extension of Christendom. In 1492, Columbus writing to King Ferdinand and Queen Isabella stated:

> Your Highness ought not to consent that any foreigner do business or set foot there, except Christian Catholics, since this was the end and the beginning of the enterprise, that it should be for the enhancement and glory of the Christian religion, nor should anyone who is not a good Christian come to these parts.

[See, Sources of West Indian History, by F.R. Augier and S.C. Gordon, at page 89].

This religious exclusivity was not limited to would be settlers but extended to all inhabitants: enslaved indigenous Indians (Amerindians) were converted to Christianity. To quote from Acosta's, History of the Indies, 1604: "Yet God of his bounty … has made the subjection of the Indians, a perfect remedy for their salvation."

The position with respect to Trinidad is documented in The Royal Cedula on Colonization given on the 24th November 1783 by the Spanish King, whereby in establishing the underlying policy for settlement and commerce in Trinidad it was stated:

> Article 1st. All foreigners, the subjects of powers and nations in alliance with me, who are desirous of establishing themselves, or who are already settled in, the said Island of Trinidad, shall sufficiently prove to the Government thereof, that they are of the Roman Catholic persuasion, without which they shall not be allowed, to settle in the same; but the subjects of these my dominions, or those of the Indies, shall not be obliged to adduce such proof, because no doubt can arise as to their religion.

Thus, for 300 years Trinidad was an exclusive Christian Roman Catholic colony, with an overt policy of Christian religious exclusivism, and the origins of that policy can be traced to the first sighting of the island on the 31st July 1498.

With Capitulation this religious exclusivity changed. By Article 11 of the Articles of Capitulation, signed on the Island of Trinidad on the 18th February 1797, it was declared that: "The free exercise of their religion is allowed to the inhabitants." Of course all inhabitants of the Island had to swear allegiance to the King of England "upon pain in case of non-compliance of being sent away from the Island" (Article 15). And of course this free exercise of religion was in the context of a transfer of power from Roman Catholicism to Anglicanism (English Catholicism). Practically therefore Trinidad remained a Christian Colony. In fact the official British policy was that only Governors and Councillors must be members of the Church of England. Governors were instructed that they should "in no other case suffer any man to be molested or disquieted in the exercise of his religion …; only we oblige you in your own house to the possession of the Protestant religion, according as it is here practiced by us in England, and the recommending it to all others under your command." [See Augier and Gordon, supra at page 91].

It may thus be fair to say, that with and following Capitulation, the official policy on religion in Trinidad shifted from one of insistence to one of persuasion – in the context of Christian pluralism. But it is also clear that governance and privilege remained linked with adherence to the "acceptable" Christian religious traditions.

Thus, though there was tolerance as among Spanish and French Roman Catholic Christians and the British and Dutch Protestant Christians, the attitude to non-Christian beliefs was quite different.

As is pointed out in the General History of the Caribbean, Vol. III – The Slave Societies of the Caribbean (Ed. F. W. Knight), in the section entitled "Colonial state churches and religions conformity" (at page 293):

> The centrally important feature of the slave workers' new religious setting, however, was consistent throughout the Caribbean: non-christian beliefs and practices were outlawed and practitioners punished with torture, transportation and death.

This then was the general religious context in Trinidad, from the time Columbus claimed the island, to the abolition of slavery in 1834 in the British Empire (by the Abolition Act, 1834, UK; proclaimed in Trinidad in 1838).

African slavery really started in Trinidad with the Cedula of Population in 1783. Before that there were only a few people of African descent, the majority of the population being Amerindians along with Spanish settlers. By 1797, when Trinidad was conquered by the British, there were about 10,000 African slaves. However, between 1797 and 1806, under British rule, the slave population rose to about 20,000. In 1806 the slave trade to Trinidad (one of the 'newly acquired colonies') was prohibited. By 1834 when slavery was abolished, Trinidad had become a slave colony and African slaves constituted the majority of her population. It is to be noted that though 1834 marked the formal end of slavery, former slaves were not 'fully free,' as all slaves (over six years) had to be 'apprenticed' to their former owners and had to work forty-five hours a week unpaid. This apprenticeship scheme was only abolished on the 1st August 1838, when full freedom was granted to all former slaves – Emancipation. [See Besson and Brereton, supra at page 99].

[The information stated above and following is a matter of public record, indisputable and well known. It forms parts of the notorious local history of Trinidad. The following information has been recorded by many historians and analysts, including Professor Brinsley Samaroo (e.g. in India in the Caribbean and Pioneer Presbyterians – Origins of Presbyterian Work in Trinidad); Isaac Dookeran (e.g. in A Post Emancipation History of the West Indies); Idris Hamid (e.g. in a History of the Presbyterian Church in Trinidad, 1808 – 1968); and Professor John La Guerre (e.g. in Calcutta to Caroni, The East Indians of Trinidad)].

It is into this historical, religious, ethnic and sociological context that East Indians (from India) arrived in Trinidad under the Indentureship System.

Prior to the abolition of slavery and the introduction of the farcical apprenticeship system, Trinidad had become a plantation economy based on the production of export crops, 'King Sugar' and cocoa being the main exports. African slave labour was the underlying basis of the island's social and economic structure, both of these export crops being heavily labour dependent. It was not surprising that in the ten years prior to abolition, the planters in Trinidad passionately resisted the movement towards abolition. Abolition was seen as the death of their income and the island's economy.

It was also against this background of protest and need, especially with the failure of the apprenticeship system and with the Emancipation of former slaves and with the general reluctance of the ex-slaves to remain or work on the plantations, that alternative sources of labour, cheap labour, had to be found if the island's plantation economies were to be sustained and economic disaster averted. This was the general economic context in which indentured immigrant labour was introduced into the British West Indian colonies (including Trinidad) in the post Emancipation era.

The first East Indian immigrant ship, "The Fatel Razack," left Calcutta in February 1845 and arrived in Trinidad on the 30th May 1845. There were two hundred and twenty-seven East Indian immigrants on board – men, women and children. This was the beginning of the indentured labour system in Trinidad. It continued until 1917, by which time some 143,939 Indian immigrants had arrived in Trinidad.

Though the indentured immigrants were under contract for a fixed period of time (after which they could return to their land of origin), the vast majority stayed. In Trinidad some 110,645 Indian immigrants remained, most of whom continued to reside and work on the plantation estates.

Given that the vast majority of East Indians who came to Trinidad during the period of indentureship were of the Hindu and Muslim religions, their proportion to the overall population is important to understanding the relevant context in which the Applicants' arguments are based.

By 1871 there were over 27,000 East Indian immigrants out of a total population 110,000 in Trinidad (i.e. about 25% of total population).

The following table illustrates the ratios between East Indians and the total population in Trinidad over time.

YEAR	NO. EAST INDIANS	TOTAL POPULATION	PERCENTAGE OF TOTAL POPULATION
1871	27,000	110,000	25
1946	195,747	556,931	35
1960	301,946	819,362	37
1970	373,538	923,552	40

The population statistics published by the Government Central Statistical Office for 2002 show that people of East Indian descent made up 40.3 and 40 percent of the population in the years **1990** and **2000** respectively. This publication also demonstrates that for the years 1990 and 2000 about 24 percent of the population were Hindus and 6 percent Muslims (that is, at total of about 30 percent of the population). It also appears that for these two periods, the total Christian population (Roman Catholics, Anglicans and Presbyterians) was 44 percent of the total population.

What was the attitude of the governing agencies towards the non-Christian population in Trinidad and in particular towards the Hindus and Muslims?

In fact, all immigrants who replaced the ex-slaves on the plantations fell onto the lowest rung of the social ladder. Professor Samaroo describes "the lot of the East Indian Immigrant" as follows:

> To many the East Indian was an unwelcome intruder and *"a competitor for the crumbs which fell off the planters' table."* He was resented by the Africans, exploited by the plantation owners and neglected by the Government. The African resented the indentured Indian because his arrival on the labour scene destroyed the African's chance of obtaining higher wages. East Indians were further despised as being inferior in physical strength and were also seen as the new slaves who were forced to carry a pass-book. Other sections of the population also had anti-Indian feelings. Some saw the East Indians as *'semi-barbarians'* with a tendency to be *'unruly and riotous'*. Even Lord Harris gave his view of the East Indians whom he thought were hardly different from the ex-slaves: "*They are not, neither coolies or Africans, fit to be in a position which the labourers of civilised countries must at once occupy. They must be treated like children, and wayward ones too; the former from their habits and religion; the latter from the utterly savage state in which they arrive."*
>
> Thus large sections of the community rejected the East Indians because of physical, social, religious and cultural differences. Mutual distrust existed between Africans and East Indians. The Indians reciprocated by not participating fully in the society. Besides regarding the African as being not so highly civilised as himself, his religion and customs afforded a certain degree of exclusiveness. Many of them felt a *"social and religious reluctance to have their children educated with those of a different faith and different race."* Therefore in 1865, twenty years after their first arrival, and with a population of more than 20,000 or 25% of the total population, not more than twenty Indian children were to be found in the public schools of the island.

[In Professor Samaroo's, Pioneer Presbyterians at pages 7-8].

The non-Christian, East Indian immigrant labourer experienced alienation and marginalization in Trinidad, based not only on class (labourers on the plantations) but also because of culture and religion. Placed in an entirely new context, predominantly Euro-centric (which meant christo-centric) with traces of an Afro-centric nature, the indentured Indians strived to preserve and practice their religious beliefs and observances, use their home languages, dress, food and maintain their culture and traditions. That is, the Indian immigrants sought to retain their identities (see, Professor Samaroo, India in the Caribbean, at page 46). This choice to preserve identity and this resistance to change and to the assimilation of the dominant customs and values set the East Indian immigrants apart from the rest of the society – a separation that cannot be de-linked from the tensions that existed between the dominant Christian religions and the 'newly arrived' Hindu and Muslim religions.

With the introduction of the Canadian Presbyterian Mission into Trinidad, which targeted predominantly the East Indian immigrant population, the alienation and marginalization of the non-Christian East Indian immigrants suffered a further complication.

In 1864 John Morton visited Trinidad to recover from an illness. He was from Nova Scotia, Canada and was the pioneer missionary to the East Indians of the Canadian Presbyterian Church in Trinidad. As Idris Hamid points out in 'A History of the Presbyterian Church in Trinidad' [quoting from the book 'John Morton in Trinidad,' by S.E. Morton (his wife), 1916 at pages 7 and 8], in reference to the East Indian Immigrant in Trinidad:

> The overriding concern of John Morton was:
>
> (i) The burden of … those 20,000 heathen people, brought into a Christian country, and none to care for their souls. "To think," he would say, "of those people living in a Christian community for years, making money, and returning to India without hearing the Gospel of Christ! What a stain on our Christianity."
>
> (ii) "Christianizing the mass of imported heathenism."
>
> (iii) "[T]hat these (Hindus and Muslims) be saved from their dark idolatry or Mohammedan delusion."

It is indisputable that the generally prevailing attitude of the governing class in Trinidad was that Trinidad was a 'Christian' country and that 'non-Christians,' certainly Hindus and Muslims, were by reason of their religions, 'heathens', 'idolaters', 'deluded' – inferior in a significant way and so 'less than' Christians.

Professor Samaroo, in 'The Presbyterian Canadian Mission as an agent of integration in Trinidad,' 1972 (at page 10), citing Morton 1917, supra at page 232, makes the following observation:

> Even if the East Indians were fellow Aryans, they had in the opinion of the missionaries, strayed from the path of civilization. To Morton they were worshipers of false gods:
>
> > 'The character of these deotas (gods) is felt to be a most vulnerable point. Brama was a liar, Vishnu an adulterer, Shiva a drunkard, Krishna shameless … . While the character of Christ is our strong point.'

Ironically, this preferential/discriminatory attitude by the governing class in Trinidad, based on religion, was contrary to the attitude of the founder of Christianity, Jesus, whose life was a critique of religious exclusivity and discrimination. However, this preferential/discriminatory attitude is important to note because it forms part of the collective 'ancient memory' and psychological context of Hindus and Muslims in Trinidad and Tobago even today.

It is now also beyond dispute that the indenture system was really one of semi-slavery (see, for example, Dr. Eric Williams, History of the People of Trinidad and Tobago, at pages 105-106; and Idris Hamid, supra, at pages 43-46). What the whip was to slavery "jail and the asylum" were to indentureship (Idris Hamid, supra at page 45).

The general alienation of and indifference to the East Indian indentured worker in relation to the rest of the society in Trinidad, is illustrated in the attitude of the governing class and of the State to their education.

Dr. Eric Williams noted, in this regard:

> The worst victims of colonialism in this respect (education) were the children of the indentured immigrants. Until the arrival of the Canadian Mission to the Indians in the 1860's no attention was paid to them at all …

[History of the People of Trinidad and Tobago, at page 211].

And, the Keenan Report of 1869 records in relation to the East Indian indentured immigrants:

> Their moral and intellectual necessities were overlooked. The coolie's mind was left a blank. No effort was made to induce him, through the awakening intelligence and dawning prospects of his children, to associate the fortune or the future of his family with the colony. It is therefore, that – collaterally, and I believe legitimately – I connect the magnitude of the periodical exodus of the Asiatics with the education system, which fails to provide for their children acceptable schools. I cannot call to mind any other case of a people who, having voluntarily come to a strange land which they enriched by their labour, were – morally and intellectually – so completely neglected as the coolies have been during the past twenty-four years …

[In Idris Hamid's, A History of the Presbyterian Church in Trinidad, supra, at page 64].

Education was used by the Canadian Mission as a vehicle for evangelism. As such its success may have been significant. But it was at a cost in terms of creating a pervasive attitude of suspicion, if not resentment, among East Indian Hindus and Muslims who valued their 'non-Christian' religious beliefs and observances (see, The Presbyterian Canadian Mission as an agent of integration in Trinidad, during the 19th and early 20th Centuries, 1972, by Professor Brinsley Samaroo, at page 17). Indeed, Professor Samaroo points out (supra):

(i) "They (Hindus and Muslims) often opposed the missionaries' evangelisation efforts … ;" and

(ii) "Some Hindus resented the fact that other East Indians had become Christians and they showed this by preventing Christian East Indians from attending Hindu Religious ceremonies."

Hindu and Muslim families were thus divided, when their children who attended the Canadian Mission Schools choose to 'become Christians' against the wishes of their families and communities (see, Morton Klass, East Indians in Trinidad: a study of cultural persistence, at page 4). As Professor Samaroo points out (in Pioneer Presbyterians – origins of Presbyterian Work in Trinidad, at page 24):

> The conversion of Hindus and Muslims led to a certain amount of disintegration in the society. In order to secure jobs many had to accept baptism and this often led to a schizophrenic personality. This was a situation created by the Church and which has been handed down to our generation (in the 1990's). Today it is still a problem … and it is creating many unpleasant relationships.

Professor Samaroo makes a similar observation in The Presbyterian Canadian Mission as an agent of integration in Trinidad, supra, at page 24, when he states:

> The Canadian Mission to the East Indians … possibly believing that the controlling hand of the British would be there for all time, seems not to have envisaged the day when the country would be under the control of Africans and East Indians. Hence they saw nothing wrong with the racial separation that existed and indeed did much to preserve this. In doing so they re-enforced the exclusiveness of the East Indian whose distinctive way of life made separation a natural phenomenon. From the mid-20th century this separation was destined to bedevil the fortunes of an emerging Trinidad and Tobago.

Indeed, many would agree that this reality is reflected in the politics of Trinidad and Tobago, for since 1956 the country has generally been divided proportionately along racial and religious lines – with Hindu indos (and other indos) largely forming one major political block and Christian afros (and other afros and others) forming another major political block. [This characterization is not intended to do otherwise than to reasonably caricature for the purpose of this case the political realities in Trinidad and Tobago].

The relevant historical, sociological, cultural and religious contexts in which the arguments in this case must be considered, include the perspectives of Hindus and Muslims who have lived and are living in this society. Their perspective is part of the 'local condition', known to anyone who has lived in the society and has been open to listening to their voices. What the above references seek to do is to present some insight into what is well and commonly known of their experiences, through the eyes, ears, and voices of renowned and highly respected sources.

An insight into this perspective may also be gained from the attitude of the governing class and of the State to marriage. In fact, Hindu marriages were not recognized as legal until the 13th May 1946 (with the passage of the Hindu Marriage Act); and Muslim marriages were similarly not recognized until the 1st December 1964 (with the passage of the Muslim Marriage and Divorce Act). Indeed, the attitude of the governing class and of the State to all non-Christians (which included non-mainstream Christian beliefs and observances) is illustrated by the following. First, it was only on the 16th August 1999 that Orisa marriages were recognized. Second, from 1917 to 1951 the observances of the Shouter Baptist faith were prohibited in Trinidad (commencing with the Shouters Prohibition Ordinance of the 28th November 1917 to its repeal on the 30th March 1951).

The impact of the non-recognition of Hindu and Muslim marriages was significant. It revealed the attitude to non-Christian religions. Non-recognition also meant that children of Hindu and Muslim marriages were 'illegitimate' and so 'outside' of the law for the purposes of, for example, succession rights. Such an attitude was clearly preferential towards Christian marriages and children born out of same and discriminatory towards

Hindu and Muslim marriages and children born out of these - not only from the point of view of individual and collective status and esteem, but also from an economic point of view. An illegitimate child could not inherent his/her parents' property.

That this attitude prevailed until 1964 demonstrates that the experience of this societal inequality and discrimination is within the living memory and experience of existing generations of citizens of Trinidad and Tobago.

Another useful societal indication of the underlying christocentric attitude and value systems of the governing class and of the State, is the choice of public holidays: "Christmas Day", "Good Friday", "Easter Monday", "Whit Monday" and "Corpus Christi" are all Christian public holidays which have been statutorily recognized since at least 1872. [In the schedule to the relevant 1872 Ordinance and to the 1980 Revised Laws of Trinidad and Tobago (Chap. 19:05) the following description of Corpus Christi appears: "Corpus Christi – first Thursday after **Trinity** Sunday". **Trinity Sunday is the first Sunday after Pentecost and is observed in celebration of the Holy Trinity** (emphasis mine)]. Whit Monday, which is the public holiday celebrating Pentecost (the descent of the Holy Spirit on Jesus' apostles, fifty days after Easter), was discontinued on the 16th February 1996 when it was replaced by Indian Arrival Day.

Against this background, the following non-Christian religious public holidays are prescribed:

(i) Eid-ul-Fitr and Divali (Muslim and Hindu religious celebrations) - Order made on the 7th December 1979.

And, the following public holidays in recognition of Emancipation, Indian Arrival and Shouter Baptist Liberation are prescribed:

(ii) Emancipation Day – Order made on the 15th October 1984.

(iii) Indian Arrival Day – Order made on the 12th May 1995.

(iv) Spiritual Baptist Liberation Shouter Day – Order made on the 16th February 1996.

Once again the partiality towards Christian beliefs and observances as against non-Christian ones is obvious. Most of the significant events in the Christian yearly cycle: the birth of Jesus, the crucifixion of Jesus, the resurrection of Jesus, the descent of the Holy Spirit on the Apostles of Jesus and the institution of the Holy Eucharist, are recognized and celebrated by the State as Public Holidays. Yet, the same is not equally true for the significant events and observances in the Hindu and Muslim yearly cycles.

Given that Independence was achieved in 1962, the timelines suggest that a legitimate perception of non-Christians could have been that the governing Trinidadian values were preferential to Christian religious beliefs (values) and observances. It cannot be over emphasized in this analysis, that the proportions of Christians to Hindus and Muslims in Trinidad and Tobago is closer to equality than not.

The above narrative and analysis is relevant because of the contention by the Applicants, in effect, that at the very least the Trinity Cross is or can rationally and reasonably be perceived by Hindus and Muslims living in Trinidad and Tobago as an exclusively Christian symbol; and therefore, that the choice by the State to use it as the symbol of its highest National Award is preferential to Christian beliefs and observances and thus discriminatory, in the multi-religious and multi-cultural context of Trinidad and Tobago, given its above stated history, culture, sociology and demography.

That is, it is in effect argued by the Applicants that given the timelines under consideration, including the attaining of Independence in 1962 and the creation of the Order of the Trinity (and of the introduction of the Trinity Cross) in 1969, the historical, religious, cultural, sociological and demographic context suggests that the Trinity Cross is rationally and reasonably perceived as a Christian symbol, which in the historical context of christocentric discrimination against Hindus and Muslims in Trinidad, is discriminatory because of the rational and reasonable aversion of Hindus and Muslims to be associated with such an award, irrespective of their own theological perspectives about the idea of “Trinity” and/or “Cross” as understood in Christian orthodoxy.

However, it is important to also state that the above description is not a complete picture of local society. In fact, though there are underlying tensions among the different groupings in society, it is also true that our people live together in relative peace and harmony. Furthermore, in relation to the Canadian Christian mission it is also important to state that together with evangelization, the general intention of the mission was for the well-being of the people.

THE TRINITY CROSS

I have already explained how the Order of the Trinity came into existence (by Letters Patent dated 26th August 1969 issued by Her Majesty Queen Elizabeth the Second). These Letters Patent were subsequently modified, pursuant to the 1976 Republican Constitution, to bring them into conformity with the provisions and changes effected by that Constitution – essentially conferring onto the President of the Republic the roles and functions of Her Majesty and the Governor General.

These Letters Patent state the intention and purpose of the Order of the Trinity and of the Trinity Cross. The Trinity Cross is to be awarded "to any person who has rendered distinguished and outstanding service to Trinidad and Tobago." It is quite clear that neither its stated intention nor purpose is religious per se. The Trinity Cross was intended to be and is an honour conferred by the State for **distinguished and outstanding service** to Trinidad and Tobago.

The Trinity Cross is also the Nation's highest award. This is made clear in clause 17 of the Letters Patent, which prescribes that (but for the Victoria Cross and the George Cross) it shall take "precedence over all other decorations." Every citizen of Trinidad and Tobago is eligible for the award of the Trinity Cross (as well as persons who are not citizens of Trinidad and Tobago). And, any person or **organization** may nominate a citizen of Trinidad and Tobago for the award of the Trinity Cross (clause 9). In fact and in practice, the nomination forms and instructions issued by the State confirm the above and explain that awards are made by the President on the advice of the Prime Minister "**and with the consent of the nominee**." Indeed, the advertisement published in a

newspaper by the Office of the Prime Minister with respect to National Awards for 2004 states in bold graphics: **"Over 1.3 Million People And Every One Has The Chance To Be Honoured."**

Despite the stated intention and purpose of the award of the Trinity Cross, the Applicants contend nevertheless that the Trinity Cross is in breach of their 4(b), (d) and (h) rights under the 1976 Constitution, because of the **effect** of the award. That is, the Applicants contend that irrespective of purpose and/or intention, the Trinity Cross is an overtly Christian symbol in name, substance and signification. And, given prevailing demographics and the historical, cultural and sociological experiences and religious beliefs of Hindus and Muslims in Trinidad, it is rational, reasonable and legitimate for Hindus and Muslims to consider the Trinity Cross an anathema and to consider its existence as the Nation's highest award disrespectful, unfair and discriminatory, as they are unequally inhibited in participating in the process of nominating, being nominated for or consenting to the award of the Trinity Cross.

On the 17th October 1963, shortly after Independence, Cabinet appointed a Committee "to make recommendations to Cabinet on the question of Local Awards" (Cabinet Minute No. 1081).

The 'first' report of that Committee (which turned out to be a four man committee - two members recorded as having not served) was completed on the 17th September 1964. The Committee stated its task as being:

> A review of the country's existing system of awards and a study of what changes may be necessary or advisable to bring it in appropriate harmony with the country's independent status and its constitutional character as a Monarchy and a Member of the British Commonwealth of Nations.

It would appear that though the "solicitation of views … of the Public" was "considered to be very essential", because of the "nature of the subject" the approach taken was that the deliberations of the Committee "should be sheltered, as far as possible, from the arena of public controversy". As a consequence the report describes the strategy adopted by the Committee as follows:

> It was therefore decided that the matter should be pursued on a confidential basis and that informal discussions would be held with key personnel of widely representative organizations or appropriate ones in a position to assist. It was hoped by this means to collate a fairly wide cross-section of informed thinking on the subject.
>
> A Confidential Circular Letter was issued in the following terms:
>
>> "I should like to inform you that Government has set up a Committee to consider, and make recommendations with respect to, the conferring of National Awards. The nature of this assignment is, for various reasons, one that ought to be handled with a certain degree of confidentiality, and this inhibits the normal approach of inviting memoranda from members of the public who may be interested.
>>
>> The Committee however wishes to invite your co-operation, and would be grateful for any assistance or advice you may feel able to offer on the matter both generally and/or with particular reference to your organization.
>>
>> The Committee has therefore, authorized its Secretary, and some of its members to hold confidential discussions on the matter with key personnel in various organizations."

And, the report notes that copies of this letter were sent to various **organizations**, including religious organizations. [At pages 2 and 3].

Having outlined the trends of views expressed to the Committee, the report summarized the position as follows:

> The situation then clearly indicated the direction in which a solution to the problem may lie; compromise or combination that is to say the partial retention of certain Commonwealth Awards and the introduction of purely local ones.

And, in pursuance of this approach the Committee recommended:

(i) The creation of a Standing National Awards Committee.

(ii) "That Trinidad and Tobago should continue to participate in the system of Commonwealth Awards" and listed nine such awards to be continued.

(iii) The introduction of <u>ten</u> local awards, including (in order of precedence):

(i) The Order of the Society of Honour of Trinidad and Tobago (a silver shield with golden Coat-of-Arms), for "exceptionally distinguished service."

(ii) The Trinity Star (gold with rosette – for persons of "considerable status" who have (a) "discharged extraordinary responsibilities or rendered exceptional or distinguished service", or (b) made "very valuable contributions … or achieved wide eminence or renown").

(iii) The Trinity Cross (gold – for "exceptional courage and bravery" or "a prolonged gallantry or heroism").

In this first report, the Committee gave no explanations for its choices of the word 'Trinity' in either 'The Trinity Star' or 'The Trinity Cross' awards recommended to Cabinet.

By a 'second' report, the Committee submitted its recommendations pursuant to another Cabinet directive (Cabinet Minute No. 1062) dated the 6th June 1968. This directive requested recommendations from the Committee on the question "<u>whether the number of proposed separate awards and classes may not be reduced</u>". This request was against the background of certain "National Awards <u>which were approved by Cabinet</u> on the 21st December 1967", and which had been divided into two categories – Civil Awards and Gallantry Awards, as follows:

(a) <u>CIVIL AWARDS:</u>

(i) **<u>The "Trinity Cross"</u>**: (One class – gold)
Based on the Trinity Hills.
For distinguished and outstanding service to the country by nationals in the public or private sector, and the non-citizens who have rendered outstanding and distinguished service to the country.

(ii) **<u>The "Chaconia Medal"</u>**: (Three classes – gold, silver and bronze)
Based on the national flower.

To social workers; community workers in all organizations which promote community spirit and national welfare: for long and meritorious service to the country or the community in their respective groups.

(iii) **<u>The "Humming Bird Medal"</u>**: (Three classes – gold, silver and bronze) To all persons who have rendered loyal and devoted service to the country in their respective fields of endeavour, which redound to the benefits or prestige of the community or country, such as members of the Labour Movement; writers and painters and other artists; artistes and sportsmen; agriculturists, manufacturers and businessmen; organizers of activities of worthy import; workers in the cultural fields, etc; and for outstanding humane action.

(iv) **<u>The "Trinidad and Tobago Medal of Merit":</u>** (Three classes – gold, silver and bronze)
To members of the Public Service, Statutory Boards and other quasi government organizations, who have rendered outstanding and meritorious service beyond the call of duty.

(b) **<u>GALLANTRY AWARDS</u>**:

(i) **<u>The "Trinidad and Tobago Distinguished Service Medal"</u>**: (One class – gold)
The members of the Armed Forces (Army, Navy and Air Force) members of the Police and Fire Services, and members of the Merchant Marine, for gallantry in the face of the enemy or for gallant conduct and devotion to duty in peace or war.

(ii) The **<u>"Trinidad and Tobago Meritorious Service Medal"</u>**: (Two classes – gold and silver)
To members of the Services cited in Item 7(b) (i) above, as also members of the Prison Services, the St. John Ambulance Brigade, the Red Cross, the Scout Movement, and other similar and associated services, for long and meritorious service.

(iii) **<u>National Service Citation</u>**: (With silver Medal)
Parchment presentation to members of the Services cited in Item 7(b) (i) and (ii) in recognition of good service and commendable conduct.

The recommendations of the Committee in its second report were for four awards, in order of precedence as follows:

(i) **"<u>The Trinity Cross</u>** (<u>based on the Trinity Hills</u>). One class – Gold. For distinguished and outstanding service to the country: or for gallantry … ." And to non-citizens for distinguished and outstanding service to the country.

(ii) "The Chaconia Medal (Based on the National Flower). Three classes – Gold, Silver and Bronze."

(iii) "The Humming Bird Medal. Three classes – Gold, Silver and Bronze."

(iv) The "Public Service Medal of Merit. With three classes of medals – Gold, Silver and Bronze."

The recommendations in the second report of the Committee were generally accepted, as the schedule to the Letters Patent issued in August 1969 refers to four categories of awards which make persons members of the Order of the Trinity, namely: the 'Trinity Cross' (gold only), "Chaconia Medal" (gold, silver, bronze), 'Humming Bird Medal' (gold, silver, bronze) and 'Medal of Merit' (gold, silver, bronze).

Annexed to this judgment is a full colour photocopy of a photograph of the front of the Trinity Cross. The agreed elements of the emblem are:

> A gold medal with dimensions 52 millimetres long by 38 millimetres wide suspended from a ribbon with the national colours red, a white edged black central stripe and yellow edges.
>
> The front:
> 1. A ship's wheel at the top.
> 2. A helm or helmet facing front, beneath it.
> 3. A large circle (18 millimetres in diameter) with four splayed arms of equal length (11 millimetres long) emanating from the circle; one arm facing north, one facing south, one facing west and one facing east at a 90° angle from each other; the arms wider at the ends (12 millimetres) than at the centre (5 millimetres); three of the four edges on each arm are straight.
> 4. Inside the large circle the words "**FOR DISTINGUISHED SERVICE**" are embossed in a ring around the circle.
> 5. Inside the large circle is a smaller circle with three mountain peaks in the middle with the sea beneath.
> 6. In between each of the four arms and resting on a flat base lies a bird with wings spread – a scarlet ibis on the top left and a cocrico on the top right; a cocrico on the bottom left and a scarlet ibis on the bottom right.
>
> The back:
> 1. An irregular shape with a circle resembling a coin in the middle with the words "**TRINIDAD AND TOBAGO**" embossed around the inside of the circle.
> 2. The words "**YDL 10K T'DAD**" embossed at the bottom."

In interpreting the motifs incorporated in the Trinity Cross great assistance can be had from the Coat of Arms of Trinidad and Tobago, which was designed and formally agreed

to be used in 1962. A full colour photocopy of the Coat of Arms of Trinidad and Tobago is also annexed to this judgment.

The following meanings/interpretations are agreed with respect to the relevant motifs in the Coat of Arms (and are in any event matters well known and indisputable):

(i) Supporting the Shield, on the dexter side is a Scarlet Ibis and on the sinister side a Cocrico (both birds are indigenous to Trinidad and Tobago – the Cocrico being particularly native to Tobago), and representing respectively the islands of Trinidad and Tobago.

(ii) The Three Peaks on the side of the Scarlet Ibis (which were principal motifs of Trinidad's early British Colonial Seals and Flag – Badges), commemorate both Columbus' decision to name Trinidad after the Blessed Trinity and the Three Peaks of the southern mountain range (called the "Three Sisters") in Trinidad which a sailor on Columbus' ship saw when the island was first sighted during Columbus' third voyage.

(iii) The Gold helmet facing front in the Helm represents Her Majesty the Queen of England.

(iv) A golden ship's wheel in the Crest.

One can see that the motifs in the Trinity Cross mirror to a certain extent the basic arrangement of the motifs in the Coat of Arms. That is, starting from the top of the Trinity Cross: a golden ship's wheel, a gold helmet facing front, a cross pattee overlaid by and bearing a centrally placed circle embossed with the Three Peaks at its centre and with the inscription "For Distinguished Service" and flanked by identical pairs of the Scarlet Ibis and the Cocrico (which mirrors the Shield in the Coat of Arms).

Historically, the Cross Pattee became popular in medieval heraldry and was an adaptation of the Greek Cross (with equal length arms), which was one of the original forms of the cross used by Christians (believed to have been in use from about the 5th Century – see, B.M. Metzger, M.D. Coogan, The Oxford Companion to the Bible, (1993) at page 57). It is believed that the Latin or Passion Cross (which has a longer vertical shaft with equal length horizontal arms) entered into Christian usage in about the 8th or 9th Centuries.

Thus, one can conclude that from a religious perspective, the motifs of the cross pattee and of the Three Peaks used in the Trinity Cross have both longstanding general and specific Christian associations and usage - the cross pattee being one of the original forms of cross used as the central symbol of Christianity and the Three Peaks being one of the local symbols used in the context of Trinidad's unique history to designate the Blessed Trinity (God) in Christianity. Significantly, the arrangement and positioning of these two central motifs (literally and symbolically) are such that their Christian associations pragmatically impart interpretation and meaning to the intention to base the Trinity Cross on the Trinity Hills. That is, in Trinidad and Tobago the Trinity Hills are understood and interpreted in the context of Columbus' signification of them.

Apart from the religious perspective, it is I think fair to comment, using the meanings of similar motifs in the Coat of Arms, and to conclude, that the golden wheel and front facing golden helmet, link the Trinity Cross to Trinidad's 'discovery' by seafaring Europeans and its colonial history under the British; that the Scarlet Ibis and Cocrico symbolize indigenous Trinidad and Tobago; and further, that the inscription on the face of the Trinity Cross declares the intention and purpose of the award.

Apart from the above, and in relation specifically to the use of a cross as one of the central motifs in the Trinity Cross, it is important to note that the cross has, particularly in the history of western civilizations, been used as a symbol for outstanding bravery, heroism, valour and gallantry.

Trinidad, as a former colony of Britain and member of the Commonwealth, has been greatly influenced by European and British christocentric values and traditions. And, as a result of this historical link with Britain, Trinidad and Tobago shares identifiable traditions and customs with it.

Indeed, the First Report of the National Awards Committee desired to retain and recommended the continuation of pre-independence Commonwealth Awards conferred by Her Majesty, including The Victoria Cross and The George Cross. In fact, in the

Schedule to Her Majesty's Letters Patent, reference is made to these two awards, at clause 17(1), which when dealing with orders of precedence provides:

> When worn in Trinidad and Tobago by a citizen of Trinidad and Tobago the Trinity Cross shall be worn suspended from the neck and takes precedence of all other decorations except the Victoria Cross and the George Cross.

Thus, though it is clear from the Constitution of the Order of the Trinity that the Trinity Cross was to be the highest and most prestigious award in Trinidad and Tobago, the Victoria Cross and George Cross were to take precedence over it.

The Victoria Cross is the highest award for exceptional valour displayed "in the face of the enemy" that can be awarded to members of the British and Commonwealth forces.

It was first issued on the 29th January 1856 for acts of valour during the Crimean War of 1854-1855. It was instituted by and named after Queen Victoria, who reigned as Queen of the United Kingdom from the 20th June 1837 to the 22nd January 1901. It takes the form of a cross pattee, bearing on the front a crown, surmounted by a lion and the inscription 'FOR VALOUR.'

The George Cross is the corresponding honour for civilians for acts of valour that do not qualify as "in the face of the enemy." It is second only to the Victoria Cross. The George Cross was instituted by King George VI in 1940, when the German Luftwaffe subjected the civilian population of Britain to mass bombing. It is awarded for acts of the greatest heroism, of the most conspicuous courage, in circumstances of extreme danger. Though instituted by King George VI, the George Cross was named after St. George (born in 270 AD) the patron saint of England.

It is believed that St. George, while on one of his missions as a soldier serving under the Roman Emperor Dioletian, was in England and heard of the torturing and putting to death of Christians because of their faith and returned to Rome and begged the Emperor to desist from such action. It is believed that the Emperor tried to get George to give up his Christian beliefs, but he refused, and was beheaded in Lydala, Palestine on the 23rd April

303 A.D. Around 900 A.D. George was universally recognised as a Saint among Christians. The banner of St. George (the martyr) – a red cross on a white background, was integrated into the uniforms of British soldiers around the reign of Richard I and later became the flag of England. By the end of the 14th century Saint George had been officially acknowledged as Patron Saint of England.

The George Cross is in the form of a Greek Cross. On the front is depicted St. George slaying the dragon, with the inscription 'For Gallantry'. [The legend of George and the Dragon is considered an allegory of the persecution of Christians by Dioletian, who was sometimes referred to an 'the dragon' in ancient texts]. Clearly the George Cross has profoundly overt Christian associations and symbolisms.

This extended discussion about the Victoria Cross and the George Cross is relevant to the issues raised in this case, because the Respondent has contended that neither the words 'Trinity' or 'Cross' nor the actual Trinity Cross in terms of its design and motifs can reasonably be considered Christian or associated with Christianity.

I disagree with all aspects of this contention.

In the context of Trinidad and Tobago, given its history, it is quite clear that the words 'Trinity' and 'Cross' can be associated with the Blessed Trinity and the cross of the Christian religion. To link the words reinforces that association.

In my opinion, to argue that in Trinidad and Tobago a reference to 'The Trinity Cross' would not reasonably or likely evoke Christian associations is erroneous. The historical context and reasons that demonstrate this error have already been outlined.

But contemporary reasons for this association in Trinidad and Tobago also exist.

At present, the American Christian evangelical cable television station 'TBN' is received and transmitted to and viewed by thousands in Trinidad and Tobago. 'TBN' stands for

Trinity Broadcasting Network. Also, the local Roman Catholic (Christian) television agency, is known as the '**Trinity** Television, Channel 10.' And, the Anglican Cathedral in the capital city is the 'Cathedral Church of the **Holy Trinity.**'

Further, the cross remains a highly publicised Christian symbol – if not the dominant Christian motif across all Christian traditions in Trinidad and Tobago. For example, on every church (and there are hundreds throughout Trinidad and Tobago – Roman Catholic, Anglican, Presbyterian, Methodist, Baptist, Evangelical non-denominational) and every church school and every church building – variations of the cross appear. Crosses are worn and publicly shown by thousands of Christians throughout Trinidad and Tobago – not just to church, but to work and at play.

In my opinion, the local conditions in Trinidad and Tobago, both historical and contemporary, attest to the long standing and widespread use and association of 'Trinity' and 'Cross' by and with Christian beliefs and observances.

In my opinion, it is entirely unrealistic to suggest that the existence or linking of 'Trinity' and 'Cross' in the 'Trinity Cross' is not likely to evoke Christian associations in a plural society like Trinidad and Tobago, because the concepts of 'trinity' and 'cross' are known to Hindus; or that since the 'Trinity' in 'Trinity Cross' is based on the 'Trinity Hills' it cannot be offensive to anyone.

With respect to the first contention, it is in my opinion quite disrespectful and also inaccurate to suggest that there are concepts equivalent to the Christian concepts of 'trinity' and 'cross' in Hinduism; or even that there is a concept of 'trinity' or 'cross' per se in Hinduism.

In Hinduism, there is a concept of **'Trimurti'**, representing the triad of Brahma (the creative aspect of God), Vishnu (the preservative aspect of God) and Shiva (the destructive or reabsorbative aspect of God). The triad are all of equal strength and potency, emanating as manifested aspects of the same one unmanifested Brahman

(‘Ekam Vipra Satya Bahuda Vadanti’ – Truth (God) is one but it is called by different names).

To suggest that the Holy Trinity in mainstream Christianity represents the triad of Brahma, Vishnu and Shiva, or that Columbus could have been open to that association in 1492 when he named Trinidad (and the Trinity Hills) after the Holy Trinity in Christianity, demonstrates without more why the converse is equally absurd.

No Hindu in Trinidad and Tobago, hearing the word ‘Trinity’ in association with ‘Cross’, as in ‘Trinity Cross,’ would naturally or spontaneously associate its usage with the Hindu concept and understanding of ‘Trimurti.’ Indeed, no Hindu scholar would likely do the same.

Equally with respect to the cross. In Hinduism there is a motif known as the **‘swastika’** - 卐, which is an auspicious symbol. Its name is likely derived from a combination of ‘su’ (well), ‘asti’ (is) and ‘ka’ (a noun ending) – that is, “It is well.” Its design is believed by many to be derived from either the wheel (symbolically reduced to four spokes set at right angles) – which is in itself an auspicious symbol in Hinduism and/or from the two fire sticks of the Vedic sacrificial fire, which were usually set down at right angles to one another.

Clearly, to suggest that the cross in Christianity and the swastika in Hinduism are in some way similar or even related is fallacious. How would mainstream Christians respond if told that the sacrifice of Jesus on the cross could be associated with the Vedic sacrificial fire? To pose this question and observe the truthful response, is all that is necessary to test and refute this aspect of the Respondent’s contention.

Religion is not an entirely intellectual affair. Religion is also about beliefs, traditions, observances and feelings. Religion is about a person’s and a community’s experience, identity and existence – and to this extent it is subjective.

I accept without reservation, that given the historical, sociological and religious experience of Hindus in Trinidad and Tobago (including the colonial indentured experience) and given the Hindus' religious beliefs and observances (including the belief in the extraordinariness of its avatars, such as Shri Rama and Shri Krishna – incarnations of God, and the absolute disparagement of these by mainstream Christian proselyzers), for a Hindu who perceived the Trinity Cross as having Christian symbolism, to nominate someone or be nominated for it, or to consent to accept or to wear it, could reasonably and naturally be a cause for discomfort.

How would a Jew feel if asked to wear the "Hakenkurz" as the highest medal of honour? The point here is not to equate the colonial Indian indentured experience with the Jewish holocaust experience; but equally it is vital not to minimize the Indian indentured experience in a christocentric colonial and post-colonial Trinidad and Tobago. It may be that better comparative indicators, would be the consideration of a Christian nominating or being nominated for, or consenting to accept or to wear as the highest National Award of Trinidad and Tobago, the 'Allah Crescent' or the 'Brahman AUM,' the central motifs of which would be respectively: ☪ and ॐ, the 'crescent moon' of Islam and the 'AUM' of Hinduism; and to be told that they are based on natural phenomena and a universal cosmic sound and that 'Allah' and 'Brahman' mean 'God' which is a concept known and worshiped in Christianity.

The best example of the Hindu Indian response to the Trinity Cross, is that of His Holiness the Dharmacharya Pundit Krishna Maharaj who, in a highly publicised affair in August – September 1995, in writing to His Excellency the President of Trinidad and Tobago, declined receipt of the Trinity Cross – accepting "the tribute" but not "the award itself." The headlines in some of the daily newspapers at the time included: "Pundit blanks Trinity Cross" (Guardian Newspaper); "Hindu Leader Rejects Trinity Cross – Top award 'a symbol of Christianity'" (Newsday Newspaper, September 1st); and "Hindu high priest: No cross around my neck" (Newsday Newspaper, August 31st).

And, Professor Selwyn Ryan, respected sociologist at the University of the West Indies, writing at that time on “the controversy over naming the nation’s highest award, the Trinity Cross” (Express Newspaper, September 10th 1995) stated:

> The inclusion of the term “Cross” in the label given to the country’s highest honour is also said to contribute to the sense of “alienation” and lack of patriotism felt by many.
>
> “How can such a large part of our population feel a sense of belonging and patriotism when the highest award to which they can aspire evades their very presence by acknowledging the Christian cross and failing to recognize the Muslim crescent or the Hindu Om?” (Quoting the Secretary of the Caribbean Hindu Centre).
>
> Older generations of Indians were, with a few exceptions, prepared to defer and genuflect to the dominant Eurocentric and Christian value system of the society, preferring to concentrate instead on economic, cultural and educational self-help and improvement. They saw themselves as being marginals in the society who had to petition the Establishment for opportunity and political protection. Now that a certain platform of achievement has been reached in several critical areas of the society, group confidence is high.
>
> My own view on this particular issue is that as galling as it might be to fundamentalist Christians, the use of the term cross, a religious symbol with significance for only one section of the population, should be discontinued, and a more culturally neutral term found to denote the country’s highest national honour. It should be done quickly and with grace. Those who chose the label did so without giving much thought to the implications of their decision, simply because it was epistemologically difficult for them to do so.
>
> The world today, however, is quite a different place from what obtained in the Forties, Fifties and Sixties. Then, societies were unthinkingly rushing along the path of westernization without asking questions about the validity and universality of western cultural assumptions.
>
> Multi-culturalism is now, however, a widely cherished goal in many societies.

These excerpts from Professor Ryan are not cited here as evidence, but as opinion, which this court acknowledges reflects generally the views of many non-Christian Indians in Trinidad and Tobago and which also reflects accurately a mainstream post-modern interpretation of this society’s sociological evolution viewed through the eyes of locals.

With respect to Islam, the opinion of this court is generally no different from that stated with respect to Hinduism in the context of the local conditions in Trinidad and Tobago.

However, in Islam, there are clear and unequivocal beliefs that make any association with the Christian beliefs in a trinitarian God and/or the crucifixion of Jesus on the cross an anathema.

In Christianity, the doctrine of the Holy Trinity formally entered the religion with the formulation of the Nicene Creed at the First (Ecumenical) Council of Nicaea, convened by the Roman Emperor Constantine in 325AD. The Council was convened specifically to settle a dispute raised between the Bishop of Alexandria and one of his priests – Arius. This dispute concerned the nature of the Trinity. Arius (Arianism) contended for sub-ordinationism – that is, that 'the Father' is indivisible, transcendent and the singularly divine being. Therefore, Arius contended, 'the Son' was not of the Father's essence and there was no equal ontological relationship between the two. The son was 'begotten' in the sense that he was 'made', and so is a 'ktisma' or 'poie ma', a creature. For Arianism, the concept of the Son is summarised in the infamous phrase: "there was when he was not."

The Nicene Creed, in rejecting this aspect of Arianism as heresy, confesses that the Son is begotten, but affirms the ontological unity of the Son, stating that he is "true God from true God" begotten "from the Father" and "not made." To put the matter beyond any doubt, the Creed asserts of the Son that he is "from the being (ousia) of the Father" and "of one substance (homoousia) with the Father."

The Council met again, some fifty-six years later (in 381AD), confirmed the Nicene Creed and amended it to add with respect to the Holy Spirit, the assertion that the Holy Spirit had the same (ontological) nature (divinity) as the Son. Thus, this Niceno – Constantinopolitan creed (as it is known) established the orthodox teaching on the Holy Trinity as it is understood within mainstream Christianity today.

The final clarification to the understanding of the nature of Jesus was effected at the Third (Ecumenical) Council – the Council of Ephesus, in 431 AD. Here the emphasis was to denounce the Nestarianism contention of the time (that Mary gave birth to a man,

Jesus, and not to God; and that the Word ('Logos') only dwelled in him: Jesus was therefore "Theophoros" – "Bearer of God") as heretical. The Council decreed that Jesus was one person, complete God and complete man; and that Mary was "Theotokos" – "Mother of God," because she gave birth not to a man but to God as a man.

Thus, emerged the Doctrine of the Holy Trinity, as believed and understood in orthodox Christianity, the 'homoousia' of Father, Son and Spirit – One triune God: Father, Son and Spirit; three distinct persons, but of one and the same essence (nature). Thus, in the classic formulation of the Nicene Creed, Jesus Christ is: "God of God, Light of Light, very God of very God, begotten, not made, being of one substance with the Father." This doctrine of the Holy Trinity is the one common doctrine that all manistran Christian denominations subscribe to (even if with varying nuances). Put in local parlance: 'The doctrine of the Holy Trinity is as Christian as you can get.'

It is into this historical and doctrinal context that Islam emerged as a world religion and joined issue with orthodox Christianity about the nature of God and of Jesus (often in circumstances of ongoing wars and disputes with Christians).

In Islam, the concept of God is unequivocally and uncompromisingly monotheistic. This is most concisely reflected in the Shahada, the Islamic declaration of faith, which states "La illaha illa llah" - "there is no God but God (Allah)". Islam stresses that Allah is self-subsisting and sufficient without the need for forebears, offspring or equals. In Islam the doctrine of 'shirk' or 'association' is considered an unforgivable sin. This doctrine concerns the associating of other beings with God.

For example, in the Qu'ran (the Islamic scriptures – believed to have been directly revealed to the Prophet Muhammad by Allah through the Angel Gabriel) it is stated:

> "They surely disbelieve who say: 'Allah is the third of three (a Trinity);' when there is no God except the one God. And if they desist not from so saying, verily, a painful torment will fall on those of them who disbelieve."
> Al Maa'idah (the Table Spread) 5:73.

> "They indeed have disbelieved who say: 'Allah is the Messiah, son of Maryam (Mary).' "
> Al Maa'idah (the Table Spread) 5:17.

> "And the Jews say: 'Uzair (Ezra) is the son of Allah,' and the Christians say: 'The Messiah is the son of Allah.' That is their saying with their mouths. They imitate the saying of those who disbelieved of old. Allah (Himself) fighteth against them. How they are deluded away from the truth! They (Jews and Christians) have taken as Lords besides Allah their rabbis and their monks and the Messiah son of Maryam (Mary), when they (Jews and Christians) were commanded [in the Tawraat (Torah) and the Injeel (Gospel)] to worship One God. There is no God save Him. Be he glorified from all partners that they associate (with Him)."
> Al Tawbah (Repentance) 9:30-31.

Orthodox Muslims therefore believe that the concept of the Holy Trinity is the essence of 'shirk' or disbelief in 'tawheed' (the oneness of God). Such a belief is thus considered the gravest and most unforgivable sin in Islam.

In fact in the Qu'ran it is specifically stated:

> "O people of the Scripture (Christians)! Do not exceed the limits in your religion, nor say concerning Allah anything but the truth. The Messiah 'Eesa' (Jesus) son of Maryam (Mary), was no more than a Messenger of Allah, and His Word which He bestowed on Maryam (Mary), and a spirit (Rooh) created by Him. So believe in Allah and His Messengers, and say not: 'Three (trinity)! – Cease! (it is) better for you! – Allah is only One God. Far is it removed from His transcendent majesty that he should have a son."
> Al Nisa' (Women) 4:71.

> "And they say: 'The Beneficient has taken onto Himself a son.' Assuredly you state a disastrous (false) thing."
> Maryam (Mary) 9:88-89.

Here the Qu'ran refers to both the Christian doctrines of the Holy Trinity and the Incarnation of Jesus and condemns both as erroneous. By these former verses of the Qu'ran Muslims are therefore prohibited from associating with the Holy Trinity. As if to emphasise the point, the Qu'ran in verse 175 states: "O Mankind! Now has a proof from your Lord come into you, and we have sent down to you a clear light (that is the revelation in the Qu'ran)."

As to the cross, which in Christianity is associated with the crucifixion of Jesus, Islam does not accept or believe in the crucifixion of Jesus. The Qur'an states:

> "That (the Jews) said: 'We killed the Messiah Jesus the son of Mary, the Messenger of Allah.' But they killed him not, nor crucified him, but so it was made to appear to them; and those who differ therein are full of doubts, with no (certain) knowledge, but only conjecture to follow; for of a surety they killed him not, this is certain. But Allah took him up unto Himself. Allah was very Mighty, Wise."
> Al Nisa (Women) 4:157-158.

Indeed, in the Hadith or Sunnah of the Prophet Muhammed (as attested to and recorded by Sahib Bulchari), it is recorded that:

> "Allah's Apostle (Muhammad) said, 'By Him in Whose Hands my soul is, son of Mary (Jesus) will shortly descend amongst you people as a just ruler and will break the Cross … "

The 'breaking of the cross' in the text is interpreted as a repudiation of the Christian beliefs associated with the crucifixion of Jesus on the cross.

In my opinion, it is both reasonable and rational for Muslims of Trinidad and Tobago to legitimately not want to be associated with the Christian beliefs and symbols/motifs of the Holy Trinity and/or the Crucifixion/Cross. In so far as the Trinity Cross includes and represents those beliefs and symbols, it is reasonable, rational and legitimate for Muslims in Trinidad and Tobago to not nominate persons or be nominated for the Trinity Cross or to consent to accept or wear the Trinity Cross.

The angst over this issue by a Muslim is captured notoriously by the experience of the Honourable Dr. Wahid Ali, former President of the Senate and Acting President of the Republic of Trinidad and Tobago (who received the Trinity Cross in 1977).

Writing in July 1992, Dr. Ali explained (as stated in his book: "Building Bridges in Society: selected speeches of Dr. Wahid Ali; at pages 27 – 31, in a chapter entitled: "The Trinity Cross Issue – An Inappropriate National Award"):

> Trinidad and Tobago is an independent Republican, Caribbean nation. It attained independence on 31st August 1962. Its population is multi-racial and multi-religious; its National Anthem proclaims "here every creed and race find an equal

place." Our country adopted a Republican Constitution in 1976 (Act No. 4 of 1976) and among the Rights enshrined in Part 1 of that most fundamental document is the "right to freedom of conscience and religious belief and observance."

Not long after the attainment of independence the Government of the day announced that it had accepted the recommendations of a committee which had been studying the matter of appropriate national awards. Thus the adoption of the "Order of the Trinity" and of the "Trinity Cross" as the nation's highest national award.

Muslims believe in the Oneness of God; the concept of the "Trinity" is un-Islamic. Muslims do not believe that the Holy Prophet Jesus died on the cross and so the designation "Trinity Cross" as our nation's highest national award is objectionable to Muslims.

Not long after our nations' independence I returned home from medical studies; the next year I was elected Vice-President of the A.S.J.A. Inc., the most representative Muslim organisation in the country. At the following General Meeting of that organisation held at the Jama Masjid Hall, Queen Street, Port of Spain, under the Presidency of the late Haji S.M.S. Rahaman, **I proposed that the Muslim community should protest against the designation 'Trinity Cross' as our nation's highest national award**. That proposal was unanimously adopted by the meeting and publicised in the media.

In 1972, I was serving as President of the infant Inter-Religious Organisation of Trinidad and Tobago, and also as President of our country's Senate. I wrote as a private citizen to certain prominent religious leaders in an effort to ascertain their reaction on this issue. **It was my intention that if the religious leaders consulted found the designation inappropriate, I would raise the matter in the IRO with a view to recommending a change**.

In August 1977 His Excellency President Ellis Clarke T.C., through his secretary Mrs. Tam, as befits protocol in these matters, informed me that I had been selected for the award of the 'Trinity Cross' for public service to be announced at that year's Independence Anniversary celebration. **Without disclosing my reasons, I indicated my intention to decline**. At a later meeting, she informed me that President Clarke wished to advise me against declining, as my nomination had been made by the Prime Minister, Dr. Eric Williams. I have always had a high regard for these two distinguished citizens of our country, **and so was in a state of perplexity**.

My next step was **to discuss the matter with the Prime Minister who gave the verbal assurance that the entire matter of national awards was to be reviewed. I then consulted my local Ustad** (Teacher) Haji Muhammad Yusuff Francis whose counsel I have always treasured. He advised me to accept, emphasising that God knows what is in our hearts; and in his opinion, I was doing a useful job in the public life. **I had indicated to him that the appropriate thing to do if I declined the award was to resign my public office. After deep prayer and reflection** I indicated to Mrs. Tam that I would accept the award. **I had made my bed and had to lie on it**.

> As a private citizen I am willing to join in a positive, civilised approach to this problem. **If, however, the promise made by Dr. Eric Williams remains unknown** (perhaps unrecorded before), **and unheeded, the question of my retaining the "The Trinity Cross" indefinitely will certainly merit serious consideration**. Only Almighty God knows the duration of our earthly lifespan.

[The emphasised portions of Dr. Ali's statement reveal his opinions and angst – which appear to be ongoing].

Thus, while it is clear that there may be Muslims and/or Hindus who may have absolutely no problem with the Trinity Cross or may have been nominated for it and accepted it, that does not negate the reasonable, rational and legitimate objection by Muslims and Hindus to the award.

Indeed, this is the complaint of the Applicants in this case.

In an affidavit sworn by the Second Named Applicant on his own behalf as a Hindu and as the Secretary General of the First Named Applicant (and on its behalf), he stated their experiences, perceptions and opinions as follows (at paragraphs 6, 11, 12 and 17):

> The SDMS have always objected to the retention and use of the Trinity Cross as the nation's highest award. The objection is grounded in the fact that the cross is widely known and perceived as a Christian symbol. The cross symbolizes the Christian belief that the son of Mary was crucified on a wooden cross. The concept of the "Trinity" is also strongly connected to the Christian faith, as it symbolizes the three aspects of Godhead – God the Father, God the Son and God the Holy Ghost.
>
> The SDMS has been forced to refrain from participating in the process for the nation's highest honour and award because it perceives it as and believes it to be a patently Christian Symbol. Over the years we have approached many prominent Hindu, Muslim and other non-Christian citizens who have refused to give their consent for us to nominate them on the basis that should their nomination succeed, it would be inconsistent with their religious beliefs to accept the Trinity Cross and they would rather avoid this potential embarrassment.
>
> I have also been approached by various Hindu organizations (including the SDMS) and the Global Organization for People of Indian Origin **("GOPIO")** over the years but have always declined to consent to being nominated because it is inconsistent with my religious beliefs to accept or wear the Trinity Cross. Over the years many deserving candidates have refused to consent to being nominated when approached by the SDMS. This include the late Pundits Krishna Maharaj, Siewdath Maharaj (deceased), Uttam Maharaj, Sharma Basdeo,

> Vishnu Harribachan, Capildeo Maharaj, Lakshmidath Persad Maharaj and the late Bhadase, Dr. Omah Maharaj. Other outstanding individuals who were approached but declined for the same reason include Raj Jadoo, Bally Ramkissoon, Ramlogan Palloo, Chandrika Maharaj, Chandrawatie Maharaj, Shanti Mahraj and Devant Maharaj.
>
> The SDMS and its Hindu members and I have no grouse with our Christian brothers and sisters and the many distinguished recipients of the Trinity Cross. Our problem and grievance lies with the State because it refuses to change the name and symbol of the nation's highest award/honour despite the knowledge that it is in fact, and/or is widely perceived to be, a Christian symbol and is therefore not acceptable to non-Christians.

The First Named Applicant (the SDMS) was duly incorporated on the 11th June 1952, and claims to be the largest representative organization for members of the Hindu Faith in Trinidad and Tobago. In fact the SDMS owns and runs forty-three primary schools, twelve pre-schools, five colleges and one hundred and fifty Mandirs in Trinidad and Tobago and has over two hundred branches throughout Trinidad and Tobago.

In similar language the Fourth Named Applicant stated his and the Third Named Applicant's (IRCL) experiences, perceptions and opinions as follows (at paragraphs 4, 5, 6, 10, 15 and 19):

> The IRCL has over the past two years approached many of its members and several prominent members of the local Muslim community with a view to obtaining their consent to being nominated for consideration by the National Awards Committee for the nation's highest award, the Trinity Cross. Our members including Zianool Ali, Shaliza Ali, Kazim Mohammed, Mallana Imran Hosein and Haseeb Majid have all declined nomination on the basis that the Trinity Cross is essentially a Christian Symbol and it would conflict with their religions belief to accept such an award in the event they were chosen.
>
> The IRCL in a paid newspaper advertisement on 23rd day of September, 2004 publicly criticized the "Trinity Cross" because we are of the view that this award is a Christian Symbol. Muslims have their own religious symbol, which is a half-crescent moon and a star. We are of the view that the symbol and award of the Trinity Cross amounts to religious discrimination against non-Christians in society.
>
> I have also been approached by the executive of the IRCL and members of the wider Muslim and national community with a view to obtaining my consent to be nominated for the Trinity Cross. I too have declined to consent to being nominated because I am of the view that it would conflict with my religious scriptures and belief to accept/wear the Trinity Cross.

> The IRCL have always objected to the retention and use of the Trinity Cross as the nation's highest award. The objection is grounded in the fact that the Cross is widely known and perceived as a Christian symbol. The Cross symbolizes the Christian belief that the son of Mary was crucified on a wooden cross. The concept of the "Trinity" is also strongly connected to the Christian faith, as it symbolizes the three aspects of Godhead – God the Father, God the Son and God the Holy Ghost.
>
> The IRCL has been forced to refrain from participating in the process for the nation's highest honour and award because it perceives it as and believes it to be a patently Christian Symbol. Over the years we have approached many prominent Hindu, Muslim and non-Christian citizens who have refused to give their consent for us to nominate them. They have stated that should their nomination succeed, it would be inconsistent with their religious beliefs to accept the Trinity Cross and they would rather avoid this potential embarrassment.
>
> The IRCL and its Muslim members and I have no grouse with our Christian brothers and sisters and the many distinguished recipients of the Trinity Cross. Our problem and grievance lies with the State because it refuses to change the name and symbol of the nation's highest award/honour despite the knowledge that it is in fact, and/or is widely perceived to be, a Christian symbol and is therefore not acceptable to non-Christian.

The IRCL is an Islamic Organization and was formed in 2002 and duly incorporated in 2004. It claims to have a membership of one thousand persons. In its newspaper advertisement referred to above the IRCL set out the Quranic and theological bases for its (Islam's) objections to the Trinity Cross; they parallel the Quranic texts cited and what is stated hereinabove.

The controversial nature of the Trinity Cross is however not limited to the matters set out above.

In 1997, pursuant to a decision of the Cabinet (made on the 30th January 1997 pursuant to section 8(d) of the Schedule to the Letters Patent), the National Awards Committee met by virtue of a mandate given to it by His Excellency the President (of the Republic of Trinidad and Tobago) and Chancellor of the Order of the Trinity to consider the National Awards System.

Of the six issues considered by the Committee, the third was: "What should be the National Awards? In particular ought the Trinity Cross to be retained and, if not, what should replace it? Should any other changes be made in the National Awards?"

By its report (dated the 6th August 1997) the Committee, in respect of the third issue, stated as follows:

> Regarding the name of the awards, members considered the views that have been expressed by members of the public over a period of time. The Trinity Cross, the country's highest award, has attracted negative criticism particularly on account of the word "Cross" which is perceived as a Christian symbol. It was put to the meeting that the cross is not exclusively a Christian symbol so that argument for change is based on a false premise. The point was made also that "Trinity" may also be regarded as a Christian reference but that if one followed the argument through to its logical conclusion, "Trinidad", as part of the country's name, would also have to be changed.
>
> It was suggested that the "Trinity Cross" as the nation's highest award should be changed to "The Order of Trinidad and Tobago" thereby embracing the entire country. The majority was in favour of changing the name of the award. However, the Committee was evenly divided on the choice of name for the award i.e. as between "Order of the Trinity" on the one hand and "Order of Trinidad and Tobago" on the other. Those supporting the former made the point that it would serve to maintain a link with the award under its original designation.
>
> The Chairman informed the Committee that SPINK of London, dealers in Fine Art and Royal Medallists, had proposed to His Excellency the President (in 1995) certain "modifications and enhancements to better serve the diverse requirements of the Trinidad and Tobago Honours System." SPINK indicated that the Trinidad and Tobago honours system at present did not conform to international standards. They proposed the modification of the present Order of the Trinity into three 'Orders' and one 'Medal' as well as a 'Decoration' for gallantry. The details are contained in the attached report of a meeting between the Secretary of the National Awards Committee and a representative of SPINK on Friday April 18, 1997.
>
> The Committee agreed to support with some amendments the proposals by SPINK and to recommend three (3) Orders i.e. the Order either of Trinidad and Tobago or of the Trinity, the Order of the Chaconia and the Order of the Humming Bird, with three (3) classes in each Order, and three (3) Medals i.e. the Public Service Medal of Merit, the Military Medal of Merit and the Sun of Valour (for gallantry).

It is worth noting that that Committee comprised two former Chief Justices, who were Members of the Order of the Trinity and recipients of the Trinity Cross: The Honourable

Mr. Justice Michael de la Bastide T.C. (chairman) and The Honourable Sir Isaac Hyatali T.C. (the former being the current President of the Caribbean Court of Justice).

This Committee also "strongly" recommended that their Report be made available for public comment and the public be invited to express its views on all of the issues placed before the Committee.

In the report of the meeting between the Secretary of the National Awards Committee and a representative of SPINK (Mr. Eagleton), what was proposed by SPINK was "**The Order of Trinidad and Tobago" to "replace The Trinity Cross,**" having taken "account of the objections raised by some concerning the 'Order of the Trinity' " (referred to in a letter dated 6th December 1996 from SPINK to His Excellency the President of the Republic of Trinidad and Tobago).

In that letter Mr. Eagleton on behalf of SPINK stated *inter alia* (the court's emphasis):

> **The Order of Trinidad and Tobago might be a suitable award to replace the controversial Trinity Cross**. It also comprises the protocolaire complement of insignia accorded to heads of state and international dignitaries.
>
> **Throughout, we have avoided religious symbolism**, focusing on the flora and fauna of Trinidad and Tobago. The Cocorico has been overthrown by the Mott Mott bird owing to its recent unpopularity in Tobago. The two birds – the Scarlet Ibis and the Mott Mott are placed to complement one another on the badge of the Order of Trinidad and Tobago. This gives an idea of what can be done.

In fact, since 2003 there have been about sixty-seven articles written in the local daily newspapers about the Trinity Cross. A rough evaluation (based on research done by the court) suggests that of these sixty-seven articles, fifteen were in favour of retaining the Trinity Cross, twenty-two were in favour of changing it and about thirty may be considered "neutral". This information is not cited for any "evidential" purpose, but merely as anecdotal and illustrative of the local conditions, which are publicly notorious and indisputable.

The simple fact is that in Trinidad and Tobago for a very long time (relative to the creation of the award) the Trinity Cross has been a controversial award because of its indisputable Christian associations.

This court also takes judicial notice of the recent annual occurrence of a "National Awards Ceremony" put on by the Global Organization of People of Indian Origin (GOPIO), which is an obvious counter cultural response to the failure by the State to revise the existing National Awards. Again, though not evidence before this court, this court notes that at the 2005 GOPIO National Awards Ceremony Mr. Reginal Dumas (member of the above 1997 de la Bastide National Awards Committee) gave a much publicized feature address and roundly criticized the Trinity Cross because of its exclusive Christian symbolism.

This court as a determiner of fact is of the clear view that the Trinity Cross, both in name and design, in the particular historical, sociological and religious context of Trinidad and Tobago, is reasonably, rationally and legitimately perceived by Hindus and Muslims as having unequivocal Christian religious associations. And, given the experiences and the reasonable, rational and legitimate perceptions and beliefs of Hindus and Muslims, it is reasonable, rational and legitimate for Hindus and/or Muslims in Trinidad and Tobago to not participate in the process of nominating persons or being nominated for or consenting to accept or receive or wear the Trinity Cross.

The questions in law that follow upon these findings of fact are whether in light of them there has been or is likely to be any contravention of sections 4(b), (d) and/or (h) of the 1976 Constitution in relation to any or all of the Applicants.

ENTITLEMENT TO RELIEF, 1976 CONSTITUTION

The Respondent argued that the Applicants were not entitled to any relief under the 1976 Constitution, and advanced two arguments in relation to this:

(i) The First and Third Named Applicants as corporate entities cannot enjoy the protection of and sue for an alleged breach of section 4(h) rights.

(ii) None of the Applicants could reasonably be considered as persons with respect to whom the provisions of section 4(b), (d) and (h) have been or are likely to be contravened (see section 14(1) of the 1976 Constitution).

In support of the first argument, the statements of Warner J.A. in **CBS Ltd vs The Attorney General** Civil Appeal No.16 of 2004 are relied on, where (at page 12, paragraph 20) the judge stated in reference to section 4(h):

> It was, therefore, not open to the appellants to allege discrimination on account of the personal characteristics of the group of persons which he represented. **Further it seems to me that a right such as the right to freedom of religion, must attach to a natural person**.

It was therefore argued that the First and Third Applicants cannot claim any 4(h) breach as they are corporate entities and not natural persons.

In support of the second argument, it was submitted that given the purpose of the award and the history of awardees, it was clear that the Trinity Cross was/is awarded to "unique" and "distinguished" people – in the language of the award itself: "distinguished and outstanding". In the Respondent's contention, it cannot be reasonably suggested that any of these Applicants can realistically be considered able to qualify for the Trinity Cross. As Mr. Martineau S.C. put it, one needs to look at the "remoteness of the opportunity … the unlikelihood that these Applicants will get it".

I agree that to satisfy section 14(1) of the 1976 Constitution, these Applicants must show that one or more of the provisions of section 4(b), (d) or (h) has been or is likely to be contravened in relation to him/it.

However, I disagree that it is clear that this cannot be demonstrated with respect to these Applicants. The advertisement soliciting nominations for all awards states: "**Over 1.3 million People And Every One Has The Chance To Be Honoured**". That advertisement also states that "**Individual or organizations**" may submit nominations "of a citizen" of Trinidad and Tobago for the award of the Trinity Cross. In 1987 "**Pan**

Trinbago" (a Steelband Association) and in 1991 "**The Regiment of Trinidad and Tobago Defence Force**" and "**The Trinidad and Tobago Police Service**" were awarded the Trinity Cross. The Trinity Cross has also been awarded to scientists, lawyers, cricketers, sailors, sports persons, doctors, beauty pageant winners, writers, carnival band leaders, artists and community workers. Indeed, organizations were consulted in pursuance of the creation of the Order of the Trinity and the establishment of National Awards.

Given the purpose of the Trinity Cross, its availability to all citizens, the role that all citizens are invited to play in the process and the cross section of awardees, this court cannot say with any reasonable degree of certainty that these Applicants do not or will not qualify to be nominated for or awarded the Trinity Cross and hence to be disentitled to pursue this action by reason of the section 14(1) limitation.

In the present case, what is at stake is not only selection for the honour, but also the entitlement to participate in the process, which includes nominating citizens (natural and "corporate" persons) and being nominated. The evidence is that all of these Applicants have been approached to be nominated and have declined to be so nominated or to participate in the process of nomination because of the discrimination alleged in this case.

In this court's opinion, each one of these Applicants is eligible for consideration and entitled to engage the process, to be nominated and/or to nominate; and in any of these situations I have no doubt on a balance of probabilities, given their history and involvement in the society, that the Applicants would be received and treated with regard and respect by the National Awards Committee and the Prime Minister.

In so far as the first argument is concerned, in addition to the above factors, the following are noteworthy.

First, the quoted statements of Warner J.A. are *obiter dicta*, as in the case under consideration the issue was one of unfair treatment and no relief was granted as a

consequence of any breach of religious beliefs or observances. In my opinion, a religious organization can subscribe to specific religious dogmas, practices and observances and therefore arguably may enjoy the protection of rights with respect to same.

Second, the First and Third Applicants are not corporate citizens of a primarily commercial character; but are corporate citizens with a religious purpose, involved in the society on the basis of certain religious principles. For example, in the case of the First Applicant, it is responsible for numerous Mandirs and schools throughout Trinidad and Tobago where Hindu religious beliefs and observances (lifestyles) are taught, shared and practiced.

Third, in **Smith v L.J. Williams** [1980] 32 WIR 395 the Court of Appeal of Trinidad and Tobago determined that corporate citizens are entitled to claim a breach of the section 4 rights in relation to them (see pages 417 and 422-423). **Smith v L.J. Williams** is in fact authority for the general principle that non-natural persons (including corporate entities) are entitled to the protection of such of the provisions of sections 4 and 5 of the 1976 Constitution **as by their nature they are capable of enjoying** – at page 423 g-h.

In this court's opinion it is quite clear that a "**person**" who may apply to the High Court for section 14(1) relief includes both a "natural person (and) also non-natural persons," such as the First and Third Applicants. The real test, it would appear, is whether it can be shown in relation to the First and Third Applicants that by their natures, they are capable of enjoying 4(h) rights and are also entitled to protection for breaches of same. In my opinion, the answers to both of these questions are in the affirmative.

For example, in relation to the First Applicant the following is noteworthy. By Ordinance No.15 of 1932 there was "established in the Colony (of Trinidad) an Association known as the Hindu Sanatan Dharma Association of Trinidad … **which is representative of the Hindus in the Colony**." Subsequently, by Ordinance No.19 of 1932 the Incorporation of certain persons as Trustees of The Sanatan Dharma Board of Control was effected. Then, by Ordinance No.41 of 1952 the above stated Association

and Board of Control "resolved to amalgamate the two bodies into one Association to be known as and called the Sanatan Dharma Maha Sabha of Trinidad and Tobago" (the First Applicant). Thus, the First Applicant has since 1952 been the corporate body considered by the State as "representative" of Hindus in Trinidad and Tobago. From the 2002 census data issued by the Central Statistical Office, of a population of one million two hundred and sixty-two thousand people, 22.5 percent (or 283,950 persons) are Hindu. As already stated the First Applicant the Sanatan Dharma Maha Sabha (SDMS) has many schools and colleges and temples spread throughout Trinidad and Tobago. These institutions are owned, managed and run by the SDMS and represent and meet the religious, educational, cultural and lifestyle needs and interests of Sanatanis Hindus in Trinidad and Tobago.

In my opinion, the above is clear evidence of the intent, purpose and reach of the SDMS and therefore indicative of its "nature". In my opinion, if the State were to, say, attempt to curb or inhibit unconstitutionally the practices and observances legitimately conducted at the SDMS institutions, the SDMS would in my opinion be entitled to seek section 14(1) protection and relief. The fact of its 'non natural' personhood should not be a bar to locus standi or relief.

In my opinion, one of the clear rights that the First Applicant, the SDMS, is capable of enjoying as a religious institution is the right to nominate persons for and be nominated for the award of the Trinity Cross. The advertisement soliciting nominations is addressed to individuals and organizations. And, already in its history at least on three occasions non-natural persons have been awarded the Trinity Cross.

A similar process of analysis and application shows that the Third Applicant, like the First Applicant, is also entitled to seek section 14(1) protection and relief in the circumstances of this case.

<u>THE EQUALITY PROVISIONS, SECTION 4(b) AND (d), 1976 CONSTITUTION.</u>

Section 4(b) and (d) of the 1976 Constitution states:

> 4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
> (b) the right of the individual to equality before the law and the protection of the law;
> (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions.

It is clear and accepted that these fundamental rights and freedoms existed even before the creation of a written constitution or the conferring of constitutional status on them. It is also clear and accepted that with respect to **<u>all</u>** of the enumerated rights and freedoms, **non-discrimination "by reason of race, origin, colour, <u>religion</u> or sex" is prohibited** and deemed unconstitutional. Independently of (and together with) this general prohibition, the 1976 Constitution guarantees the rights and freedoms stated in the 4(b) and (d) equality provisions.

Thus, an individual is constitutionally guaranteed equality before the law; the protection of the law; equality of treatment from any public authority in the exercise of any functions; and also the enjoyment of these without discrimination by reason of race, origin, colour, religion or sex. Thus, because of the structural arrangement in section 4, the 4(b) and (d) guarantees are not limited by the general non-discrimination prohibition, although it also applies to them (see pages 427 and 435 f in **<u>Smith v L.J. Williams</u>**).

However, for any constitutional complaint on the basis of inequality or discrimination to be justiciable it must fall within these equality provisions.

<u>All</u> persons are entitled to the enjoyment of these fundamental rights [see paragraph (a) of the Preamble to the 1976 Constitution; section 11(1) of the Interpretation Act; **<u>Powell v Kempton Park Pacecourse Co.</u>** (1899) AC 143, at 157, 185 and 192-193 and **<u>Matthew v The State</u>** (2004) UKPC 33, per Lord Walker].

In Trinidad and Tobago, the interpretation and application of these equality provisions [4(b) and (d)] have been considered in the context of two categories: (i) legislation and (ii) administrative action (acts of public authorities/officials – in the administration of the law) [see **Smith v L.J. Williams**, at page 410 j – in relation to 4(b)].

The local courts have so far appeared to have interpreted and applied both 4(b) and (d) rights without any insistence on separate intention or purpose. Indeed, in **Smith v L.J. Williams**, Kelsic J.A. interpreted "equal treatment" in 4(d) in terms of the definition of "equal protection" in 4(b) – (at page 415g). However, as Bernard J. obviously recognised in **Smith v L.J. Williams,** 4(d) was concerned with "equality of treatment" by 'public authorities' (at pages 411-414).

It would appear to me that what can be gleaned from the case law is that section 4(d) is restricted to administrative actions by public authorities in the exercise of any functions, whether that power is exercised by an authority or an individual (**Smith v L.J. Williams**, at pages 411 – 412). However, the case law also suggests that common to both 4(b) and (d) is the understanding that "equality" – whether as "equal protection" or "equal treatment" means "equal treatment in similar circumstances," so that "there should be no discrimination between one person and another if as regards the subject matter … their position is the same" (**Smith v L.J. Williams**, at page 415). Or, as Cross J.A. put it [in the context of 4(d)]: "It is the lack of even handedness in … treatment … to which the prohibition in section 1(d) of the Constitution (1962) is directed").

It would also appear from the case law that the equality provisions in section 4 are "among the most important of the fundamental guarantees" (**Smith v L.J. Williams**, at page 412 g).

In this context it is therefore important to reiterate, that rights such as the rights to individual liberty, freedom of speech, freedom of religion and the equality rights, are original freedoms, which are essential conditions for life in a free, fair and peaceful society.

The historical move to written constitutions and to the statement of fundamental rights and freedoms was not primarily a creative exercise, but one of the codification of pre-existing principles, found necessary for the creation of free and peaceful societies.

Post World War II and consequent upon the creation of the United Nations, in about 1966 the International Convention of Civil and Human Rights (ICCHR) was agreed by member States of the United Nations (as were the International Convention on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Racial Discrimination). These documents were created primarily in the service of peace and freedom in and among the States of the world. Trinidad and Tobago is a signatory of the ICCHR. This is significant, because it signals the commitment of Trinidad and Tobago to the project of peace and freedom both within Trinidad and Tobago and in its international relations.

It is self evident that there can be no real and meaningful peace or freedom without equality, fairness and non-discrimination. Thus, these values are essential if a truly democratic way of life is to be achieved and their protection critical.

For these reasons, one can safely state that at the heart of the equality provisions in section 4, is the intention and purpose of eradicating unfairness and discrimination and the creation of true freedom and peace in Trinidad and Tobago. This intent and purpose is no doubt particularly so given the context of the multi-ethnic and multi-religious society that exists in Trinidad and Tobago; a society that existed for all practical purposes as such from the time of its emergence as an independent Nation State.

Returning to the two categories in which the equality provisions operate, that is legislation and administrative action, the law in Trinidad and Tobago at present appears settled with respect to the former and quite unsettled with respect to the latter, certainly in so far as the tests for proof of same are concerned.

A. LEGISLATION

In **Smith v L.J. Williams**, Bernard J., citing with approval Basu's Shorter Constitution of India (1976) 7th ed., Vol. 1 (where Article 14 of the Indian Constitution is dealt with and in particular equality before the law and the equal protection of the law), accepted that "equal protection" may be denied either by legislation or by administrative acts. And, that "when a law is challenged as discriminatory the relevant consideration is the effect of the law and the intention of the legislature." [Basu, at page 47]. These requirements were in contradistinction to the requirement for proof of "mala fides" in the administration of a particular enactment (**Smith v Williams,** at page 411).

Bernard J. was of the view that with respect to legislation, a presumption of constitutionality existed and the burden was on the aggrieved party to show a breach of the fundamental rights provisions.

In the Court of Appeal Kelsick J.A., in adopting the principles stated by Laskin J. in the Supreme Court of Canada's decision in **Curr v R** (1972) 26 DLR (3rd) 603 at 611 on the Canadian Bill of Rights, opined that with respect to section 4(b), in so far as legislation is concerned, "inequality of the law is not confined to discrimination on the grounds prescribed in the introductory clause" but that legislation may "none the less be offensive … if it is violative of what is specified in any of the paragraphs" (a) to (k) in section 4 [at pages 427 d and 425 b); and thereby seems to have also accepted the "effect" aspect of the test stated by Laskin J. (with respect to section 223 of the Criminal Code Canada) as is implicit from what is quoted below:

> It is, therefore, not an answer to reliance by the appellant on section I(a) and section I(b) of the Canadian Bill of Rights that section 223 does not discriminate against any person by reason of race, national origin, colour, religion or sex. The absence of such discrimination still leaves open the question whether section 223 **can be construed and applied** without abrogating, abridging or infringing the rights of the individual listed in section I(a) and section I(b).

It is important to note however, that in **Smith v L.J. Williams** the judicial statements with respect to legislation were all *obiter dicta* as the case involved inequality of treatment by reason of administrative action (the application of a law and not the law

itself). The "effect" test has also been endorsed, again as *obiter dicta*, by Hamel-Smith J.A. in **CBS v Attorney General** Civ. App. 16 of 2004, at paragraph 21 of the judge's opinion.

As we have already seen in **Smith v L.J. Williams** (and will continue to see when we deal with equality rights in the context of administrative action), the local courts have drawn heavily on the Indian Jurisprudence on Article 14 of the Indian Constitution. [At. 14. Equality before Law - "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."]. And, in particular on the statements of the Indian Court in **State of West Bengal v Anwar Ali Sankar** (1952) 39 AIR 75/(1952) SCR 284; and specifically those of Mukherjea J. (see for example, **Smith v L.J. Williams** at pages 407, 408 – 409; **Attorney General v K.C. Confectionary Ltd.** (1985) 34 WIR 387 at pages 400 - 402, 403 and 415).

In **Anwar Ali Sankar** it was clearly established that in determining whether an impugned **law** violated Article 14, no proof of mala fides or of purposeful or intentional discrimination in its enactment was required (contrary to the case of administrative action). In that case Mukherjea J. stated (at S.C.R. page 324):

> If it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him … to assert and to prove that in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class.

And Fazal Ali J. stated (at S.C.R. page 311):

> I suggest … that it will be extremely unsafe to lay down that unless there was evidence that discrimination was 'purposeful or intentional' (Art. 14) would not be infringed. … It should be noted that there is no reference to intention in Art. 14 and the gravamen of that Article is equality of treatment. In my opinion, it will be dangerous to introduce a subjective test when the Article itself lays down a clear and objective test.

H.M. Seervai (Constitutional Law of India, 2nd ed.) supporting the view of Basu (cited above) states the 'correct test' as being: "that the effect of the impugned Act on the personal right conferred by Art. 14 must be ascertained, and if the Act involved an

infringement of such right, the object of the Act, however laudable, would not obviate the prohibition contained in Article 14" (at page 204).

Several opinions of the Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights (ICCPR) were cited to this court.

Article 26 of the ICCPR states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In **S.W.M. Broeks v The Netherlands** (No. 172/1984, ICCPR), the following statements were made in the opinion handed down on the scope and application of Article 26 of the ICCPR:

> For the purpose of determining the scope of Article 26, the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in Article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.
>
> The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26.

And, at paragraph 16, the Committee noted that although there was no intention to discriminate, the effect of the impugned legislation was to create a discrimination based on gender (sex).

In Karnel Singh Bhinder v Canada (No. 208/1989, ICCPR), the impugned legislation was not found to be in breach of Article 26 because it was determined that its purpose (of

having certain workers wear hard hats for their protection – challenged by a Sikh) was reasonable, directed to objective purposes and justified.

In **Althammer v Austria** (No. 998/2001, ICCPR), the complaint was that though certain amendments to regulations were objective on the face of it, they were discriminatory in effect:

> The authors claim that that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionably affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. [Emphasis mine].

In **Althammer** the Committee concluded that the impugned measure was based on objective and reasonable grounds and did not amount to discrimination as prohibited by Article 26 of the ICCPR.

This consideration of the above stated opinions of the HRC is based on two factors. First, the obvious commonalities in intention and purpose between Article 26 of the ICCPR and section 4(b) and (d) of the 1976 Constitution (when read together with the general non-discrimination prohibition). Second, the desirability of interpreting local legislation, so far as is reasonably possible, in harmony with the international treaty obligations of the State [see, **Boyce v R** (2004) P.C.A. No.99 of 2002, at paragraphs 26 and 54, per Lord Hoffman].

In light of all of the above, and having considered the inclination of the local courts, the approach of the Indian courts and the opinions of the HRC on Article 26 of the ICCPR, I am of the following opinions with respect to the interpretation and application of the general prohibition against discrimination and section 4(b) of the Constitution, in so far as laws are concerned.

First, in deciding whether there has been a violation of the general prohibition and/or section 4(b) both intention/purpose and effect must be considered. In this regard, three possibilities exist which can result in a breach of the guaranteed rights:

(i) the intention/purpose of the law may be discriminatory, that is, it is discriminatory "on its face;"

(ii) the effect of the law may be discriminatory though its intention/purpose is laudable;

(iii) both the intention/purpose and the effect may be discriminatory.

It would appear that in both (i) and (iii) *a fortiori*, the law would be deemed in violation of the equality/non-discrimination provisions. However, regarding category (ii), though a law may in its effect be discriminatory, it may not be considered a breach of the constitutional equality provisions so as to warrant relief under section 14 [see: **Harrikissoon v Attorney General** (1980) AC 265 per Lord Diplock]. Two obvious examples come to mind: (a) trivial and frivolous claims; and (b) justifiable, objectively purposeful and reasonable provisions (as in the **Karnel Singh Bhinder** case).

Within the second category of reasonableness, objective purposefulness and justifiability, several considerations would no doubt apply. Indeed, each case would have to be evaluated on its own particular circumstances. However, some considerations would likely be: is the effect of the differential treatment disproportionate or arbitrarily exclusive; are there objective and reasonable grounds for the differential treatment which are at least compatible with the values (principles and beliefs) enumerated in the Preamble to the Constitution and with a democratic way of life; is there reasonable accommodation for those who experience the effects of the differential treatment; and what is the historical, cultural, sociological, economic and political context (reality) in which the law is to function (for example, is there some general disadvantage, such as historical alienation or religious marginilization or political powerlessness or social stigma or economic depravation associated with those who will experience the differential treatment or conversely general advantage in the stated categories)? Clearly, wherever reasonableness must be shown, fairness is an essential component.

Second, with respect to the general non-discrimination prohibition (by reason of race, origin, colour, religion or sex), in my opinion these stated factors create a special category of discrimination which, if present, affect the approach of the courts in determining whether there has been a breach of the section 4 rights and freedoms.

As already pointed out, in Trinidad and Tobago, section 4(b) and (d) co-exist together with the general non-discrimination prohibition in section 4. The general prohibition applies to all of the eleven enumerated rights and freedoms. An analysis of the five stated aspects of the general prohibition reveal that they consist of **personal characteristics** of the individual and, but for religion, are matters which are immutable, in the sense that they cannot be changed solely by the choice of the individual. Clearly they go to the core identity of a person. Seen in this light it is not surprising that religion is included, because anthropologists agree and it is the common experience that one's religion is an aspect of identity generally conferred at birth and that its values, assumptions and beliefs become deeply embedded in an individual's consciousness. Thus, one may say that these five stated personal characteristics distinguish people on the basis of inherent attributes rather than on behavioural traits. They describe more who and what a person is, rather than how a person acts or what a person does. However, because of the nature of religion, these observations apply equally to a community of believers and impact also on behaviour.

This general prohibition against non-discrimination thus prohibits laws that differentiate between people on the basis of their inherent personal characteristics and attributes. A court is entitled to consider granting constitutional relief, where the claim is that a person has been discriminated against by reason of a condition which is inherent and integral to his/her identity and personhood. Such discrimination undermines the dignity of persons, severely fractures peace and erodes freedom.

Courts will not readily allow laws to stand, which have the effect of discriminating on the basis of the stated personal characteristics. Justification, reasonableness and objective purposefulness would have to be clearly established and one would have to carefully

consider issues of proportionality and whether adequate accommodating measures were present or available.

Third, <u>legislative discrimination could be intentional or unintentional. In terms of effect it could be direct or indirect</u>. For example, if a benefit available to others similarly circumstanced is denied or unavailable to a complainant by reference to a distinction stated or implied, or by reference (explicit or implicit) to any of the stated personal characteristics in the general prohibition, then barring satisfactory justificatory factors, a breach of section 4 could be established.

In my opinion, subject to justification and assuming similar circumstances, it would generally be enough to show that the impugned law results in disadvantageous treatment, whether direct or indirect, especially where one of the personal characteristics in the general prohibition is at stake.

Fourth, there is <u>inherent in the equality provisions an inescapable comparative element</u>. There is no such thing as absolute equality, in the sense that the law must treat every person equally: penal provisions, income tax and succession legislation demonstrate legitimate differential treatment. However, what the concept of equality encompasses is the idea that persons who are alike (similarly situated/circumstanced) should be treated alike; and that persons who are not alike could be treated differently, though in some proportion to the differences. Thus a person is treated unequally if that person is treated differently (and worse) than others who (the comparison group) are similarly situated (circumstanced) to the complainant. In <u>**Bhagwandeen v Attorney General**</u>, P.C. App. No. 45 of 2003, Lord Carswell stated, at paragraph 18:

> A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Critical in this analysis therefore is the determination of who is similarly situated/circumstanced to whom and what kinds of different treatment are appropriate for those who are similarly situated/circumstanced.

Fifth, the burden of proof is on the complainant to show both likeness and differential treatment (inequality). Once that is done, the burden shifts to the State to show reasonableness, objective purposefulness, justification, accommodation etc. In my opinion, this is so even though there is a presumption of constitutionality in favour of the impugned legislation. Further, where the alleged discrimination is on the basis of one of the stated personal characteristics in the general prohibition, then discrimination is established upon proof of likeness and differential treatment on one of the stated personal characteristics. Here, the level of scrutiny by the courts, of the State's justification, is high. Discrimination based on personal characteristics is a special category in section 4.

Sixth, "equality before the law" and "the protection of the law" [4(b)] encompass both the negative concept that "no person is above the law" and the positive concept that all persons have an inalienable right to enjoy their constitutional rights and freedoms, unrestrained except by equal and impartial laws and provided the same are reasonably justifiable in a democratic society [section 13(1) of the Constitution].

V.G. Ramachandran in his text 'Fundamental Rights and Constitutional Remedies' (discussing the scope of Article 14 of the Indian Constitution – at page 212) states the position as follows:

> No individual or groups of individuals should have differential or preferential treatment over other individuals or groups of individuals similarly circumstanced and with equal qualifications.

Thus, a complainant must show that he/she has suffered some form of differential treatment or disadvantage, by reason say of one of the personal characteristics in the general non-discrimination prohibition. This differential treatment or disadvantage may be direct or indirect. For example, a law which results in preferential treatment of a group by reason of religion, in comparison to others similarly circumstanced, with the effect that those others experience some disadvantage, could amount to discrimination by

reason of religion and a breach of the protection of the law aspect of the 4(b) equality provision [which is accentuated given the constitutional right to enjoy freedom of religious belief and observance – section 4(h)].

In determining the protection of the law aspect of section 4(b) regard must also be had to, inter alia, the constitutionally guaranteed rights and freedoms.

Seventh, <u>in determining effect – differential treatment and disadvantage, a difficult question arises as to whether the test is objective or subjective</u>. In my opinion, especially when dealing with the personal characteristics in the general prohibition, it is unrealistic to have an entirely objective test. I would therefore frame the <u>test as 'subjective objectivity</u>,' in order to capture the idea that it is not either one or the other but a synthesis of both, to be applied appropriately in the circumstances of each case, having regard in particular to the ground of the alleged discrimination or inequality.

An example will illustrate the dilemma and the recommendation: "conscience and religious belief." Conscience and religious belief are clearly highly subjective matters – both of which are considered critical to the democratic way of life which the 1976 Constitution affirms, sustains and protects. Yet an objective element is necessary, for a court must be under a duty to inquire whether the alleged beliefs are reasonable and rational (from the individual's point of view) and sincerely subscribed to (that is honestly believed in and not fictitious or capricious).

Eight, <u>the time at which the court must make its interpretation and assessment is the present time</u>. That is, the court must look at the circumstances as they exist at the present time and determine whether there is a breach of the Constitution or not (see, **<u>Boyce v R</u>** P.C.A. No. 99 of 2002 at paragraphs 54 to 59: "Constitution as a living instrument").

Ninth, as indicated first and fifth above, regard must be had specifically to the intention/purpose of the law and an evaluation made as to the justifications for and the reasonableness and legitimate aims of the provisions.

B. ADMINISTRATIVE ACTION

In Trinidad and Tobago, the law as to what is required to prove inequality of treatment or discrimination in the application of laws by administrative action is in a state of uncertainty. In the Court of Appeal there is no clear agreement as to what is required. In **Bhagwandeen v The Attorney General** [2003] the Privy Council having noted the decisions of the Court of Appeal in **Smith v L.J. Williams** and in **A.G. v K.C. Confectionary Ltd.** (1985) 34 WIR 387 and the stated necessity for a claimant to establish mala fides or a clear and intentional discrimination on the part of a public official or authority, observed that:

(i) "Deyalsingh J. reasoned cogently" in the judgment at first instance that was overturned in the Court of Appeal in **K.C. Confectionary**.

(ii) The Privy Council was "inclined to the view that there may have been a degree of confusion between two distinct concepts, the presumption of regularity and the necessity for proof of deliberate intention to discriminate in a claim for inequality of treatment."

(iii) In discrimination cases in the UK the "preferred" test was "the causative to the subjective construction … that discrimination could be established even though the respondent had not intended to discriminate" (at paragraphs 20 – 23 of Lord Carswell's judgment).

Further, in my opinion, the Board invited the local courts to reconsider these issues.

That opportunity for reconsideration arose in **CBS v The Attorney General** [2004], in which Hamel-Smith J.A., Warner J.A. and Mendonca J.A. all gave written decisions. Except for outcome there was no obvious agreement on which of the causative or subjective approaches should be adopted.

Mendonca J.A. clearly was of the opinion that the test should remain the subjective one, with a claimant having to prove mala fides, or "at least an element of deliberateness," or proof of an intentional and purposeful or irresponsible act (paragraphs 28, 31 and 34).

In particular, Mendonca J.A. also stated: "It is not the law that once inequality of treatment is found that the onus shifts on the State to provide some explanation for it" (at paragraph 34), and that "the onus could not be shifted where the presumption is subsumed on mere evidence of inequality. What has to be established is an intentional and purposeful act of unequal treatment which in turn connotes mala fides" (at paragraph 36). And further, despite the invitation of the Privy Council in **Bhagwandeen**, the judge stated: "I do not think it appropriate to express any view on whether the law as it now stands needs to be altered and in what way" (at paragraph 38).

Warner J.A. was, in my opinion, prepared to go further than Mendonca J.A. and to:

(i) acknowledge the invitation of the Privy Council (paragraph 23);

(ii) accept that "the dicta in **K.C. Confectionary** may be revisited legitimately" (paragraph 28); and

(iii) find a breach of the equality provisions (paragraph 35) even though mala fides had not been established (paragraphs 19 and 35) and where there could be no case that the claimants had been "deliberately selected for unfair treatment."

Warner J.A. then proceeded, under the heading 'The case for equality,' to state her opinion as follows:

> The entire foundation of the appellants' case has not however, in my view, been destroyed. The relevant authority had established a procedure in accordance with powers vested in it under the Ordinance. While I would not presume to hold that the Minister is not empowered to request that an application is expedited, the relevant authority had dealt with the comparator (Citadel) an entity similar circumstanced, with expedition, but had not applied the same standard to the appellants' application. It is no excuse that the application 'may have been lost,' or that there was a shift in the Ministry's location.
>
> This type of situation, it appears to me, has always come within the sweep of Section 4(d), as Persaud J.A. has demonstrated. Accordingly, there will be no departure from the rule of stare decisis when I find a breach of the equality provision on this limb.

It would therefore appear that in circumstances of proof only of differential treatment, with no mala fides or any element of deliberateness and with an unsatisfactory justification by the State, Warner J.A. found a breach of the 4(d) equality provision. If

this is a correct analysis of the judge's reasoning, then Warner J.A., without being explicit, applied a causative test to a claim of inequality of treatment based on administrative action.

However, Hamel-Smith J. A. was explicit in his openness to (if not acceptance of) the causative test. He accepted that proof of mala fides was not always necessary and acknowledged that discrimination could be established without an intention to discriminate (paragraph 19). In the words of the judge (at paragraph 21):

> It is only reasonable to conclude that his action was the deliberate and intentional exercise of a power (or discretion for that matter), the exercise of which was arbitrary and unreasonable in the circumstances of this appeal. Hence, it was contrary to law and resulted in unequal treatment. Whether such action connotes mala fides is another issue.

And, in specific reference to the reasoning of Mendonca J.A., Hamel-Smith J.A. had this to say (at paragraphs 23-29):

> Mendonca J.A. was of the view that the facts in the instant appeal did not fall within the category where mala fides need not be alleged. He found however, given the scarce resource available to applicants, that the deliberate selection of Citadel by the Minister for a grant of a licence above all other applicants, including the appellants who were all similarly circumstanced, while there was in place (i) a suspension of recommending licences and (ii) a clear stated policy of considering applications in order of submission, was an arbitrary and/or unreasonable exercise of his power resulting in unequal treatment. That action was sufficient to displace the presumption and it required an explanation from the Minister. I agree with Mendonca J.A. but while his decision maintains the need to displace the presumption with proof of mala fides I am inclined to accept that there was no such onus on the appellants.
>
> Their Lordships in **Bhagwandeen** suggested that there may have been some confusion between the two concepts viz., the presumption of regularity and the necessity for proof of deliberate intention to discriminate. The observation is well placed because inherent in the presumption is the absence of evidence, one way or the other. Once cogent evidence of discrimination is placed before the Court, whether or not the presumption operates in the official's favour, the onus shifts to the official to show that his action was justified or reasonable. The presumption in those circumstances would have been of little or no use to the official.
>
> The requirement that an applicant prove mala fides as a prerequisite may be to place a fetter on the right itself. Discrimination can be practised, and usually is, by stealth. That feature makes it difficult to discern particularly when the applicant is on the outside depending, so to speak, on the good faith and integrity of the decider on the inside. I agree with Persaud J.A. that if there is an

> allegation of mala fides then the applicant must prove it in order to succeed. But there will be cases where it is not alleged and need not be proved. In either instance the presumption is of little use and to insist that it be displaced with proof of mala fides may be lifting the bar to an extraordinary and unnecessary height.
>
> It may be that a different approach should be adopted. The right to equal treatment in the Mauritius Constitution is different from section 4(d) in that the protection there is entrenched on specific grounds but the test to determine whether there has been an infringement of the right is an attractive and compelling one.
>
> In **Jaulin v The Director of Public Prosecutions and the Hon. Attorney General** [1976] MR 96, the Supreme Court ruled that:
>
> > There is inherent in the term discriminate and its derivatives as used in the Constitution a notion of bias and hardship which is not present in every differentiation and classification … The difference of treatment will be justified when it pursues a legitimate aim and there exists at the same time a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> This test was adopted by the Privy Council in **Bishop of Roman Catholic Diocese of Port Louis & Ors. v Suttyhudeo Tengur & Ors**. (Privy Council Appeal No. 21 of 2003 unreported) and formulated in this way:
>
> > Where apparently discriminatory treatment is shown, it is for the alleged discriminator to justify it as having a legitimate aim and as having a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> The test does not require proof of mala fides and ensures that a prima facie violation of the right is not lightly sanctioned. It places the onus on the official to justify the breach and eliminates any spurious or impractical aims. It may be that he would have to show some pressing need, social or otherwise, to justify the breach but one would think that the more substantial the interference the greater the justification will have to be before the court is satisfied that the decision is reasonable.

I prefer and endorse the approach and reasoning of Hamel-Smith J.A. Clearly this approach to administrative action is consistent with the approach I have outlined above with respect to legislation. It is an approach that acknowledges effects, maintains a presumption of regularity and affords an opportunity to justify seemingly discriminatory action. It is difficult to flaw such a <u>fair and even handed approach</u> to the analysis of equality claims. This is especially so given the disproportionality of resources and access to information between the ordinary claimant and the State.

In this court's opinion, given the requirement that the 1976 Constitution be interpreted as a living instrument and given the review by the Court of Appeal after **Bhagwandeen** of the requirements for proof of discrimination by administrative action, the 'majority' view of Warner J.A. and Hamel-Smith J.A. is to be considered most persuasive (and binding) on the lower courts in Trinidad and Tobago. No doubt the Privy Council will soon settle this vexing issue once and for all.

EQUALITY AS FAIRNESS

John Rawls ("A Theory of Justice;" 1999 ed.) is famous for his theory of justice as fairness. A theory which is premised on two principles:

(i) Each person should have an equal right to the most extensive basic liberties as can be guaranteed and as are compatible with similar liberties for all others.

(ii) Inequalities in society are acceptable provided they are arranged so that the inequalities operate to the advantage of all (especially the less fortunate) and are attached to positions and offices that all have an equal opportunity to attain.

Without getting into the merits of Rawls' contention, it is my opinion that quintessentially equality is to be understood, interpreted and applied as fairness.

Aristotle is credited with the formulation: "equality consists of treating equals equally and unequals unequally." It is the principle of fairness that demands that equals should be treated alike. It is consequently unfair to treat equals differently, unless some objectively justifiable reasons exist for so doing, in which event there is no unfairness. Thus, discrimination and inequality only have real meaning in the context of fairness.

In terms of the general prohibition against discrimination in section 4, in my opinion, the 1976 Constitution intended to legislate that it is fundamentally unfair to effect different treatment on the basis of race, origin, colour, religion or sex. This is because these aspects of personhood and citizenship are fundamental to one's inherent dignity, worth

and identity and to the free and peaceful co-existence of mutually respected citizens in a civil society – who expect to be treated fairly.

Discrimination may therefore be described as a distinction, whether intentional or not, but based on grounds relating to personal characteristics, which has the effect of unfairly imposing burdens, obligations, or disadvantages not imposed on others in a comparable position, or which unfairly withholds or limits access to opportunities, benefits or advantages available to others in a comparable position in the society.

Thus, the focus is not only on the alleged ground of discrimination (to ascertain whether or not it is an enumerated ground), but also on the alleged effects of the challenged distinction. Further, since it is accepted that not all distinctions and differentiations are necessarily discriminatory and unfair, a determination must be made as to whether there is inequality or discrimination that is justiciable under the 1976 Constitution.

In regard to alleged discrimination based on personal characteristics, in my opinion, one must look not only at the challenged law and the alleged effect, but very importantly also at the larger historical, cultural, sociological, political and legal context. An examination of this larger context assists a court in determining whether differential treatment results in inequality, discrimination or unfairness. Indeed, a finding of discrimination will be unlikely unless there is also some significant and unjustifiable disadvantage and unfairness.

In my opinion, it is clear and unquestionable that a law may be discriminatory even if it is not directly or expressly so. That is, a law may be discriminatory by reason of its adverse effects: '**adverse effects discrimination**'.

Whereas direct discrimination involves a law which plainly, on its face, discriminates on the basis of one or more of the prohibited grounds in the general non-discrimination prohibition in section 4 of the 1976 Constitution, adverse effects discrimination occurs when a law, though on its face appears neutral, has a disproportionate and unjustified

negative impact on a person or group because of the personal characteristics of that person or group (for example, because of their race, origin, colour, religion or sex). What is therefore required to establish adverse effects discrimination, is that the alleged differentiation or distinction has the effect of unfairly imposing some burden, obligation or disadvantage which is not imposed on others in a comparable position, or of unfairly withholding, limiting, inhibiting or restricting access to opportunities, benefits or advantages which are available to others in a comparable position.

That is, adverse effects discrimination occurs where it has been demonstrated that without any objective and reasonable justification or accommodation, there is a failure to ensure that there is equal benefit for all and/or a failure to take steps to remove unequal disadvantages for some - amongst those who are all equals. This is so because such circumstances are **fundamentally unfair**.

RELIGIOUS BELIEF AND OBSERVANCE, SECTION 4(h), 1976 CONSTITUTION

Section 4(h) of the 1976 Constitution states:

> 4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
> (h) freedom of conscience and religious belief and observance;

The Applicants have argued for a breach of their section 4 (h) rights on two bases. First, that Trinidad and Tobago is a secular state and like the United States of America, any entanglement by the State in matters of religion is unconstitutional. Second, that the Constitution recognizes a need for religious equality and provides for the equal treatment and respect for all religions, which is a reading of the 1976 Constitution that conforms with its Preamble.

On the first submission, this court is of the opinion that the 1976 Constitution is materially different from its USA equivalent. In Trinidad and Tobago, there is no establishment clause (or its equivalent) as appears in the First Amendment to the United

States Constitution (or any incorporating provision as contained in the Fourteenth Amendment to the US Constitution). Thus, neither the Lemon Test (**Lemon v Kurtzman** 403 US 602 at pages 612-13) nor its modification as the Endorsement Test (see, **American Civil Liberties Union of Kentucky v Kentucky** 354 F.3d 438 at 446) have any direct relevance to the jurisprudence of Trinidad and Tobago.

In the USA, State practice does not violate the First and Fourteenth Amendments to the US Constitution if:

(i) it has a secular **purpose**;

(ii) its primary or principal **effect** neither advances nor inhibits religion; and

(iii) it does not foster excessive **entanglement** with religion (the **Lemon** criteria for analysis).

Under the "Endorsement Test," the "entanglement" prong is dispensed with and the court combining an objective version of the "purpose" prong with the "effect" prong asks whether a reasonable observer would believe that a particular State action constitutes an endorsement (or disapproval) of religion by the government – see, **Modrorich v Pennsylvania**, 385 F. 3d 397 [2004]. In determining whether State action impermissibly endorses religion, the forensic exercise for the court is to determine whether an objective observer, acquainted with the impugned subject, its history and implementation, would view it as State endorsement of religion (**American Civil Liberties** case supra, at 446 and 458). Thus, content, context and history are relevant in assessing purpose/intention and effect/endorsement.

The considerable time spent by attorneys on the American position has not all been wasted. From the American jurisprudence, it is clear that their way of dealing with their country's history and religious diversity, was to legislate constitutionally so as to provide that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution and may not involve itself too deeply in such an institution's affairs" (**Glassroth v Moore, Chief**

Justice of Alabama 335 F.3d 1282 at 1293). This position was achieved through specific amendments to the US Constitution. Apart from section 4(h) and the general non-discrimination prohibition (which includes religion), no such provisions exist in the 1976 Constitution. None should be read in or assumed. Noteworthy however, is the American forensic approach to discovering whether or not there has been association with religion. Here purpose and effect are both considered in the light of content, context and history. In this regard the approach is similar to that taken in the common law jurisdictions to interpreting and applying the equality provisions.

In Trinidad and Tobago, whether or not it is a secular State, there is no constitutional prohibition on State promotion, affiliation or association with religion. Indeed, the very first provision of the Preamble of the Constitution states:

> Whereas the People of Trinidad and Tobago have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowledge **the supremacy of God**, faith in fundamental human rights and freedoms … (Emphasis Mine].

Though not a theocratic State, Trinidad and Tobago constitutionally affirms the Nation's acknowledgement of the supremacy of God, clearly over and above even the Constitution itself.

However, in my opinion, the way the 1976 Constitution regulates State involvement and association in religion is through the general prohibition of non-discrimination based on religion and by the guarantee of freedom of conscience and religious belief and observance [4(h)]. These two provisions introduce the idea of equality and fairness into the State's involvement and association with religion. When one considers also the general equality sections [4(b) and (d)], then it becomes clear that any State involvement or association with religion must be impartial, fair, non-preferential and based on principles of equality. Such a reading of the 1976 Constitution treats it as a whole living document and honours the ideals in the Preamble for respect for "the **dignity** of the human **person** and the **equal** and inalienable rights which **all** members of the human family" are entitled to.

Constitutionally, the idea of the supremacy of God, is not the supremacy of any one person's or group's God over and above another's, but the equal supremacy of all persons' understandings of God.

In Trinidad and Tobago the only local case which was cited that had any real relevance to the substantive meaning and interpretation to be given to section 4(h) was **Belafonte v The Attorney General** Civil Appeal No.24 of 2004.

In the Court of Appeal the court stated that the trial judge came to certain findings of fact (paragraph 6). Though this was not itself clear from the judge's reasons, the Court of Appeal nevertheless determined that: "In view of the undisputed breach of the appellant's constitutional rights … the case should be remitted to the judge below to enter judgment … in the following terms: (ii) A declaration that the Appellant's right to freedom of conscience and religious belief and observance was infringed" (paragraph 26). Unfortunately, neither the trial judge nor the Court of Appeal gave any guidance as to how and when the rights at 4(h) arose and were violated; and in particular as to what constituted constitutionally guaranteed "conscience", "religious belief" and "religious observance".

In **Belafonte** it appears that the evidence was simply that Belafonte "had his Rastafarian 'dreadlocks' shorn off against his will and was subjected to a meat diet" and was "deprived of his vegetarian diet" (paragraphs 5, 6(iv), 21).

In my opinion section 4(h) can be interpreted as follows. First, it guarantees "freedom" to be and to act in accordance with conscience and religion. Freedom is based on dignity and equal and inalienable rights (paragraph 1 of the Preamble). Freedom is present where there is an absence of compulsion or restraint. And both coercion and constraint can be effected by direct and indirect means. Freedom in its negative sense is the absence of coercion and constraint and in its positive sense, is the right to hold and manifest beliefs and practices.

Thus, the essence of the concept of freedom of religion is the inalienable right to hold such religious beliefs as an individual chooses, and to embody and declare them openly and freely. Freedom of religious observance is equally the inalienable right to manifest, express and participate in such rituals, practices and activities which are a part of and consistent with avowed religious beliefs.

No constitutional freedom is absolute and even the freedom of religious belief and observance is subject to such limitations as are legitimate and necessary to protect the democratic way of life and having regard to the fundamental rights and freedoms of all citizens and their equal and inalienable right to enjoy same. Included among legitimate limitations could be such limitations as are necessary to protect the security of the State, public safety, order and well-being (health).

Such an interpretation is not inconsistent with Trinidad and Tobago's international obligations (see Article 18 of the ICCPR). However, I do not agree with the Applicants that the above limitations are exhaustive of those that are constitutionally permissible.

Because the freedom of religious belief and observance is characteristically individualistic, the "subjective objectivity" test mooted above is in this court's opinion the forensic exercise to be undertaken in order to determine whether the belief or observance is legitimately and constitutionally "religious".

Thus, in ascertaining whether a claimed belief or observance is "religious", the court is obliged to inquire into the doctrine or practice and to determine whether the individual demonstrates sincerity in the belief or in the practice (i.e. simply whether the belief or practice is subscribed to honestly or whether it is contrived or fictitious). Further, both the belief and practice to qualify as "religious" should be consistent with a person's perceptions of self, humankind, nature and (where relevant) with a higher, greater or different order of being (one's cosmology). And, in assessing the above, this exercise is to be done irrespective of whether a particular belief or practice conforms with and/or is prescribed by "official" religious dogma or tradition or the opinions of religious officials.

In my opinion, such an understanding of the section 4(h) guarantee is consistent with a personal and subjective understanding of the stated freedom and its linkage to "conscience".

Clearly, apart from trivial or insubstantial or frivolous claims (which suggests that the impediment to the freedom must be integral or essential or fundamental), the 1976 Constitution protects the actual or reasonably anticipated (section 14) infringement of the religious beliefs and observances of individuals and groups who can qualify for protection, whether such an infringement is direct, indirect, intentional, unintentional, foreseeable or unforeseeable (by the alleged offender).

One can therefore suggest a 3-step process with respect to this freedom:

(i) has the claimant demonstrated an honest (sincere) conviction in the practice or belief that has a legitimate nexus with religion;

(ii) if so, is the alleged abridgement trivial, insubstantial or frivolous;

(iii) if not, is there some legitimate, objectively purposeful and reasonable justification for the abridgement of the freedom.

This third step is introduced, because similar to the equality provisions, there can be no absolute freedom of religious belief and observance and an assessment of the intention and purpose of the challenged law or action ought to be considered before declaring it unconstitutional.

Further, once purpose has been evaluated as unconstitutional, a neutral effect cannot save the breach. However, even if purpose is valid, effect may constitute a breach of the freedom.

Finally, as stated above, there is clearly some overlap and interconnection between the general prohibition against non-discrimination based on religion in section 4 and the 4(h) guarantee and also the 4(b) and (d) equality provisions. In Trinidad and Tobago not only is there guaranteed freedom of religious belief and observance, but there is a prohibition

of discrimination based on religion and also the entitlement to equality (in both its positive and negative senses) and equal treatment from the law and from administrative actions. A single case may involve an inequality case, as well as a breach of the freedom of religion case, as well as a discrimination on the basis of religion case.

SYNTHESIS/APPLICATION

On the evidence, it is clear that the State has had knowledge (direct and indirect), as well as advice, that the Trinity Cross is a controversial national award and that that controversy arises from its Christian associations.

As I have already stated, in my opinion, considering the design, motifs, symbols and words which together constitute the Trinity Cross, when reasonably and objectively interpreted according to content, context and history, as is relevant to Trinidad and Tobago, it is quite clear that the words 'Trinity' and 'Cross' can at present be associated with the Blessed Trinity and the cross of the Christian religion and that the linking of those words reinforces that association.

Further, I accept without reservation that given the historical, sociological and religious experience of Hindus and Muslims in Trinidad and Tobago (beginning with the colonial indentured experience) and given the religious beliefs and observances of Hindus and Muslims, it is reasonable, rational and legitimate for both to perceive the Trinity Cross as having unequivocal Christian associations and for both to have an aversion to the Trinity Cross. And as such, it is objectively reasonable, rational and legitimate for Hindus and Muslims in Trinidad and Tobago not to participate in the process of nominating persons or being nominated for or consenting to accept or receive or wear the Trinity Cross.

All of these Applicants have demonstrated a legitimate interest in this constitutional issue. They have all meet the section 14(1) threshold requirement of having been, or are being or are likely to be affected by the alleged contraventions of section 4 in relation to them.

All of the Applicants satisfy the preliminary comparative condition of being similarly circumstanced in relation to their challenge and the subject award (with respect to their equality and non-discriminative claims). They are all members of the class of citizens of Trinidad and Tobago who can nominate citizens for, be nominated for, consent to and accept and wear the Trinity Cross and join the Order of the Trinity.

All of the Applicants have established, at least prima facie, that, though the **purpose** of the Trinity Cross is religiously neutral in that it is an honour and award for distinguished and outstanding service to Trinidad and Tobago, its **effects** are indirectly discriminatory, in that it represents and constitutes preferential treatment, approval and acceptance of overt, exclusive and historically marginalizing Christian symbolism and associations, in a multi-religious, multi-cultural State with significant proportions of Hindus and Muslims, which has been the case since at least Independence.

To this extent the **effects** of the Trinity Cross, as the highest single award in Trinidad and Tobago for distinguished and outstanding service, are to impose a disadvantage upon a significant proportion of the population and upon sincere Hindus and Muslims, which are not equally imposed upon an equally significant proportion of the population (Christians), who have historically also enjoyed in relation to Hindus and Muslims general preferential treatment in Trinidad and Tobago. The existence of the Trinity Cross award also has the continuing effects of denying, limiting, restricting or inhibiting participation by sincere Hindus and Muslims in the processes linked to the award of the Trinity Cross and access to the advantages, benefits and opportunities available to other equally comparable members of the society who can participate in the processes linked to and the advantages, benefits and opportunities derived from the nomination for and receipt of the award of the Trinity Cross and membership to the Order of the Trinity.

In my opinion, this is a case of **indirect adverse effects discrimination**. The differentiating and distinctive condition in the Trinity Cross is its overt Christian associations which identifies it with a religious subset of the society (Christians) and so differentiates and distinguishes it comparatively with Hindu and Muslim religious

symbols, associations and beliefs. The Trinity Cross thus imposes, because of the special characteristics of Hindus and Muslims, restrictive and inhibiting conditions which are not equally imposed on, at least, the Christian members of the society. [This indirect adverse effects discrimination can also quite obviously impact negatively on all non-Christians and on atheists].

The Applicants have also shown an honest conviction in their religious beliefs, observances and experiences, which are fundamental, essential and integral to their religions.

The evidential onus therefore shifts upon the Respondent to show whether some reasonable steps have been taken to accommodate Hindus or Muslims or to show some legitimate, objectively purposeful and reasonable justification that could offset the discriminatory effects of the award.

Is there any legitimate aim and sufficiently objective and reasonable basis for <u>the naming and design of the Trinity Cross</u> as the Nation's highest award?

This question is to be distinguished from the inquiry whether there is a legitimate aim and an objective and reasonable basis for creating the award per se: that is, for honouring distinguished and outstanding service to Trinidad and Tobago. Such an aim, purpose and intention is unquestionably legitimate and reasonable.

Ostensibly the justification for the name and design of the Trinity Cross as such is that it is: "<u>Based on the Trinity Hills</u>." This is the only official explanation given for the choices of design, motifs and words used in the award. As we have seen the 'Trinity Hills' have a special signification and symbolism in the history of Trinidad and Tobago. The 'Trinity Hills' do not simply describe a geological formation, but predominantly identify and are associated with Columbus' first sighting of Trinidad in 1498; when upon seeing "a range of three mountains … recited the *Salve Regina* and gave thanks to the

Lord" and remembering his vow to name the first land he saw after the 'Blessed Trinity' of the Roman Catholic faith cried out "La Trinidad."

Though the decision to name and design the Trinity Cross based on the Trinity Hills may be considered by some an objective and reasonable basis for doing so, in my opinion, in the context of:

- (i) the overall religious, cultural and sociological history of Trinidad and Tobago;
- (ii) the experiences of the Indian indentured Hindus and Muslims and their successors;
- (iii) the proportions of Hindus and Muslims to the total population;
- (iv) the above stated legitimate attitude of Hindus and Muslims to the Christian symbolism and associations inherent in the Trinity Cross; and
- (v) the fact that the award was only introduced after Independence,

the above stated basis is an inadequate justification. That this basis is an insufficient justification in the circumstances of this case is reinforced by the general and overriding constitutional prohibition against discrimination on the basis of religion.

It is relevant to note that the more substantial the interference with a protected fundamental right the greater must be the justification for any limitation or inhibition. Furthermore, there must also be proportionality between the means employed (the Trinity Cross) and the aim sought to be realized (to give effect to the intention to honour citizens for distinguished and outstanding service).

In my opinion, given the indirect adverse effects discrimination caused by the design, motifs and words of the Trinity Cross and the likely extent of those effects, combined with the high degree of protection afforded to non-discrimination on the basis of religion, there is a disproportionate adverse effect caused by the Trinity Cross that negates any justification which is based on the Trinity Hills. In my opinion, in an assessment such as is demanded in a case like this, a court is required to take a practical, realistic and pragmatic approach.

Further, no evidence of accommodation has been brought to the attention of this court. The Respondent's position is primarily that as a question of fact the Trinity Cross is not and cannot be viewed as overtly Christian in content, context or history and has no exclusive unequivocal Christian motifs or associations. This justification is maintained in the face of the history of the controversy outlined above and in light of the Cabinet appointed de la Bastide Committee (and Spinks) Report and Recommendations on the National Awards and the Trinity Cross.

The second aspect of "justification", which is really more a matter of law than of fact, is that the Trinity Cross does not constitute an award that is indirectly discriminatory or in breach of any 4(b), (d) or (h) rights and freedoms. This has been dealt with above.

The final "justification" is that the Trinity Cross is by reason of section 6(1) of the 1976 Constitution, the savings clause, an existing law which is protected from being invalidated on the basis of any violations of sections 4 and 5 of the 1976 Constitution.

In my opinion, leaving aside the savings clause argument for the moment, the Respondent has shown no accommodation whatsoever to ameliorate the indirect adverse discriminating effects of the award of the Trinity Cross on the Applicants as Hindus and Muslims and as corporate citizens representing Hindus and Muslims in Trinidad and Tobago. And, the Respondent has also not shown any legitimate, objectively purposeful or reasonable (or proportionate) justification for the indirect adverse discriminatory effects of the award of the Trinity Cross on the Applicants.

In my opinion, the Applicants would be entitled to a finding by this court that their constitutionally guaranteed rights to non-discrimination on the basis of religion and to equality and equal treatment by law and by administrative action have been breached and continue to be breached by the creation and continuation of the award of the Trinity Cross.

As regards the section 4(h) freedom of religious belief and observance, I am not of the opinion that any isolated breach of that freedom has occurred in this case even though the effect of the Trinity Cross may be seen as an indirect curtailment of the enjoyment of that freedom. In my opinion, the clearer infringement is through the conjoint effect of section 4(h) and 4(b) and (d) – the equality provisions; and it is here that I would prefer to locate any breach of the section 4 rights and freedoms of the Applicants in this case.

As the Nation's highest national award the Trinity Cross has been in existence since 1969 – that is, for some 36 years. That is a relatively short period of time. 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 that are under consideration in this case.

Were it not for the arguments that will be dealt with shortly under the savings of existing law submission of the Respondent, this court would have given serious consideration to the section 14(2) constitutional mandate to grant relief as is appropriate to enforce, secure and protect the rights and freedoms of the Applicants that have been abridged by the creation and continued existence of the award of the Trinity Cross.

EXISTING LAW, SECTION 6(1), 1976 CONSTITUTION

The Respondent argued that the Order of the Trinity, which provides for the Trinity Cross is existing law for the purposes of section 6(1)(a) and as defined at subsection 6(3) of the 1976 Constitution.

"Existing law" is defined at section 6(3) as "a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution" – that is, before the 1st August, 1976.

"Law" is defined in section 3 of the 1976 Constitution as follows: " 'Law' 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 and any unwritten rule of law."

Section 6(1) of the 1976 Constitution provides that: "Nothing in sections 4 and 5 shall invalidate – (a) an existing law."

The Respondent's argument is that the Letters Patent establishing the Order of the Trinity were made by Her Majesty in 1969 under and by virtue of section 56 of the 1962 Constitution (which vested the executive authority of Trinidad and Tobago in Her Majesty, and which included the Royal Prerogative). And, that Letters Patent issued under the Royal Prerogative, in the form of the "Letters Patent establishing the Order of the Trinity", are law and have the force of law (as opposed to being an executive or administrative instruction as argued by the Applicants).

Support for this latter contention of the Respondent is found in an article written by Roy Jordan, entitled **"A Rare Form of Law Making: Legislation made outside of Parliament"** (written from an Australian colonial/commonwealth perspective). In that article Letters Patent issued under the Royal Prerogative are described as: "an ancient form of law making inherited from England and are instruments made by the monarch without reference to Parliament under the royal prerogative which is that power of the Crown still existing and not superseded by parliamentary legislation." Jordan gives as an example the "Order of Australia Constitution and Ordinances", which he explains as follows:

> Legislation establishing the Order of Australia was made by the Queen under Letters Patent in 1975 and published in the *Australian Government Gazette* dated 17 February 1975 (no. S. 28). The Constitution of the Order may be found in the schedule to the Letters while section 30 provides for ordinances to be made.

The parallels in the above Letters Patent creating the Order of Australia to the Letters Patent creating the Order of the Trinity are obvious.

The rationale and legitimacy for the exercise of this prerogative power is, as Jordan explains, in the accepted tradition that the Sovereign was considered to be "the fountain

of all honour and dignity" and traditionally enjoyed the sole right of conferring all titles of honour, dignities and precedence.

As is explained by David Clark in "**Principles of Australian Public Law**" (2003), at paragraphs 8:23 and 8:24, the royal prerogative may be defined today as: "the residue of original royal legal power not based on statute". Its source is considered technically to be the common law and it is not to be exercised arbitrarily, but "*per legum*" (by the law) and "*sub modo legis*" (under the law). As such, Clark speaks of offices "created by a **prerogative legislation** called the Letters Patent."

There is no question of the legitimacy of the exercise of the prerogative power by Her Majesty in 1969 in issuing Letters Patent to create the Order of the Trinity. What is contended by the Applicants is that that action was an **executive/administrative instruction** and not a **legislative act** which carries the force of law.

I disagree with the Applicants on this issue. In my opinion, as Lord Diplock pointed out in **Thornill v A.G.** (1976) 31 WIR 498 at 513 (in relation to sections 1, 2 and 3 of the 1962 Constitution, which for the purposes of this issue are of similar effect of sections 4, 5 and 6 of the 1976 Constitution), "law" as defined in section 3 of the 1976 Constitution includes any unwritten law and therefore includes rules "of which the only legal source is the common law itself". And, as Lord Hoffman explained in relation to section 6(1) of the 1976 Constitution (in **Matthew v The State** Privy Council Appeal No. 12 of 2004, at paragraphs 1 and 2), albeit in relation to the mandatory death penalty:

> Section 6(1) provides that "nothing in sections 4 and 5 shall invalidate … an existing law". The law decreeing the mandatory death penalty was an existing law at the time the Constitution came into force and therefore, whether or not it is an infringement of the right to life or a cruel and unusual punishment, it cannot be invalidated for inconsistency with sections 4 and 5. It follows that despite section 2, it remains valid.
>
> The language and purpose of section 6(1) are so clear that whatever may be their Lordships' views about the morality or efficacy of the death penalty, they are bound as a court of law to give effect to it.

In my opinion, there can be little doubt that the Letters Patent establishing the Order of the Trinity are "existing law" as defined by section 6(3) of the 1976 Constitution (and are "law" as defined by section 3 thereof).

Not only is this view supported by the official publication of the Letters Patent and the annotations accompanying it in the Constitution of the Republic of Trinidad and Tobago Act, Chapter 1:01 – which states that the Letters Patent are deemed to be issued under section 6 of the Act (which provides for the exercise of a prerogative under an "**existing law**"); but the actual form, language and content of the Letters Patent suggest an intention to legislate and to create rules which have the force of law.

As such, the exercise of the Royal Prerogative under section 56 of the 1962 Constitution was a legitimate exercise of executive power, which included the power to create prerogative legislation for the creation of rules with the force of law for conferment of Honours.

In my opinion therefore, by reason of section 6(1) of the 1976 Constitution, the Letters Patent were an existing law at the time the 1976 Constitution came into force; and therefore, even though the Presidential confirmation of and the continuing existence and awarding of the Trinity Cross has been and is likely to continue to be in breach of the Applicants' rights and freedom guaranteed by section 4 of the Constitution, neither the Letters Patent nor the Trinity Cross created and administered by and through it can be invalidated for inconsistency with the provisions of section 4. This result follows if one is committed to construe and apply the 1976 Constitution as the "supreme law" of Trinidad and Tobago, as a court is constitutionally mandated to do.

This court is therefore duty bound to apply section 6(1)(a) of the Constitution as the majority of the Privy Council in **Matthews** has decreed, whatever this court's view may be about the legitimate or ethical underpinnings of the continued existence of the Trinity Cross as this Nation's highest honorary award.

COSTS

In my opinion, this case raised serious issues of great national interest. The Applicants have successfully argued the discrimination and inequality issues, though they have failed on the secular state, non-entanglement issues and ultimately on the savings of existing law arguments. In the exercise of my discretion and given the public interest in and the sharing of success on the issues raised and argued, this court will order that each party is to bear its own costs.

DISPOSITION

I have come to the conclusion that the creation and continued existence of the Trinity Cross, given the historical, religious and sociological context of Trinidad and Tobago, combined with the experiences, as well as the religious beliefs of Hindus and Muslims, amount to indirect adverse effects discrimination against Hindus and Muslims.

However, by reason of the savings of existing law provision in the 1976 Constitution, the Letters Patent establishing the Constitution of the Order of the Trinity and the Trinity Cross, are deemed to be existing law and therefore cannot be invalidated for inconsistency with the section 4 rights and freedoms under the 1976 Constitution. In the circumstances, the Applicants' action is dismissed. Each party is to bear its own costs.

I wish to thank all counsel involved for their research and presentations and for their assistance to this court.

Dated this 26th day of May 2006.

P. Jamadar
Judge

Judicial Research Assistants:
Adilah Z. Elahie; Keisha Prosper; Annika Fritz and Pryia Chankadyal.

In my opinion, the recommendation in the de la Bastide Committee Report that there be a full public debate on the issues concerning National Awards is one worth heeding. There is clearly an urgent need for such public consultation and for subsequent consensual decision making regarding the award of the Trinity Cross. In this process all are well advised to consider carefully the suggestion of SPINKS, that all "religious symbolism" be avoided in the designs and naming of our National Awards.