Michaelmas Term
[2023] UKPC 36
Privy Council Appeal No 0099 of 2021

JUDGMENT

Attorney General of Trinidad and Tobago (Respondent) v Vijay Maharaj Substituted on behalf of the Estate of Satnarayan Maharaj for Satnarayan Maharaj and another (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones
Lord Sales
Lord Stephens
Lord Richards
Sir Rabinder Singh

JUDGMENT GIVEN ON
12 October 2023

Heard on 20 June 2023

1st Appellant
Peter Knox KC
Robert Strang
Stefan Ramkissoon
(Instructed by BDB Pitmans LLP (London))

2nd Appellant
Ramesh Lawrence Maharaj SC
Dinesh Rambally
Kiel Taklalsingh
Rhea Khan
(Instructed by BDB Pitmans LLP (London))

Respondent
Fyard Hosein SC
Rishi P A Dass SC
Vanessa Gopaul
(Instructed by Charles Russell Speechlys LLP (London))

SIR RABINDER SINGH:

Introduction

1. The main issue in this appeal is whether the Sedition Act 1920 ("the Sedition Act" or "the Act"), which is a pre-independence law and was originally enacted as an Ordinance, is consistent with the 1976 Constitution of the Republic of Trinidad and Tobago. The High Court held that it is not but the Court of Appeal allowed the respondent's appeal and held that it is.

The facts

2. The first appellant is Vijay Maharaj, who pursues this appeal (by order of Seepersad J dated 13 January 2020) on behalf of the estate of his father, Satnarayan Maharaj ("Mr Maharaj"). The second appellant is a company incorporated under the law of Trinidad and Tobago, operating from the island of Trinidad. Mr Maharaj was the founder and managing director of the second appellant (Central Broadcasting Services Ltd).

3. Mr Maharaj was a well-known person in public life, who hosted a "call-in" talk show called "The Maha Sabha Strikes Back". This talk show was broadcast by the second appellant and consisted of Mr Maharaj offering commentary, with callers expressing opinions on various issues affecting society in Trinidad and Tobago. Mr Maharaj was viewed by some as a controversial figure. He often used his talk show to criticise the Government and to express strong, and at times provocative, statements on matters of public interest.

4. On 9 April 2019 Mr Maharaj made certain statements on his talk show which attracted the censure of the Telecommunications Authority of Trinidad and Tobago. The statements were subsequently transcribed as follows:

> "And now let's get down to Tobago ah little bit and what's happening there. Nothing going correct in Tobago. They lazy, six out ah ten of them working for the Tobago House of Assembly, getting money from Port of Spain. They doh want wok and when they get a job. They go half pass nine and ten o'clock they go for tea, breakfast. The rest of them able bodied men they doh wah no wok ah tall. Run Crab Race, run Goat Race and go on the beach hunting for white meat. Yuh see ah white girl dey. They rape she, they take away all she camera and everything. This record inno. This

> is what Tobago is all about but anything they want, they going to get. So now we have a lot of ferries ahready. Our Prime Minister is renting a ferry to take Tobagonians from Scarborough bring them to Port of Spain so they could buy market in Port of Spain market. They ain't growing nothing dey, they coming to make market inno. From Tobago we paying for them to come and pay market. And you know how much our Prime Minister paying our money? Every day two hundred and sixty three thousand five hundred and eighty dollars a day. For this boat to bring them lazy people from Scarborough to come and make market in Port of Spain and take them back. They wouldn't grow nothing they. They wouldn't grow nothing, when they ketch they crab is to run race and when they mind they goat, is to run race. They come in Port of Spain, growing nothing. We paying, we the tax payers in Trinidad, we paying. Whatever Tobago wants, Tobago gets and I am saying, we should they change the name of this country? We are no longer Trinidad and Tobago, we are Tobago and Trinidad. We are subservient to them, right. And this big mouth man, rasta man called Attorney General Fitzgerald Hinds, when people make statements, he like to chastise them, insult them. A lady made a statement. Hadad said 'the government mix messaging of the situation in Tobago was not helping the sea bridge' because the government was giving different messages. The response of Fitzgerald Hinds is that, 'if the woman normal'. Once you disagree with them, you are not normal. Once you point out the truth you are not normal. Well I say Hinds go and spend time seeing about your hair because it take you two days to plait them. The woman is normal and I believe she is more normal than you. That is why the fella in Sealots kick water on you, right."

5. As a consequence the Telecommunications Authority issued a warning to the second appellant on 17 April 2019, saying that the statements could be seen as "divisive and inciteful".

6. On 18 April 2019 police officers executed a search warrant at the second appellant's premises.

7. By a letter dated 28 April 2019 the Director of Legal Services of the Trinidad and Tobago Police Service, Christian Chandler, wrote to the second appellant's lawyers, saying that the police officers who had effected the search had taken a

recording and had a legitimate search warrant pursuant to section 13 of the Sedition Act. A copy of the search warrant was, however, not provided.

8. Judicial review proceedings were then commenced seeking a copy of the search warrant. The High Court declared that the failure to provide it was unlawful and ordered the Commissioner of Police to provide a copy and to make the original available for inspection within seven days: see *Central Broadcasting Services Ltd v Commissioner of Police* (CV 19 – 02135).

9. As explained in his affidavits, Mr Maharaj feared that he would be charged, prosecuted and convicted of a criminal offence under the Sedition Act. No charges were in fact laid against either Mr Maharaj or the second appellant, whether under the Sedition Act or otherwise.

10. On 31 May 2019 Mr Maharaj and the second appellant filed an originating motion challenging the constitutionality of sections 3, 4 and 13 of the Sedition Act.

11. Subsequently Mr Maharaj died. On 29 November 2019 the first appellant filed an application to be substituted for and on behalf of Mr Maharaj's estate. This was granted by Seepersad J on 13 January 2020. The respondent's appeal against that order was dismissed by the Court of Appeal and that issue is no longer a live one.

The Sedition Act

12. Trinidad and Tobago became independent in 1962. The Sedition Act was enacted as an Ordinance on 9 April 1920 and has been amended by Acts No. 172 of 1962, No. 8 of 1962, No. 36 of 1971 (passed by a special majority in accordance with the provisions of section 5(2) of the 1962 Constitution) and No. 136 of 1976.

13. The long title of the Sedition Act describes it as an "Act to provide for the punishment of seditious acts and seditious libel, to facilitate the suppression of seditious publications, and to provide for the temporary suspension of newspapers containing seditious matter".

14. Section 3 of the Sedition Act provides as follows:

> "(1) A seditious intention is an intention –

(a) to bring into hatred or contempt, or to excite disaffection against the Government or the Constitution as by law established or the House of Representatives or the Senate or the administration of justice;

(b) to excite any person to attempt, otherwise than by lawful means, to procure the alteration of any matter in the State by law established;

(c) to raise discontent or disaffection amongst inhabitants of Trinidad and Tobago;

(d) to engender or promote –

(i) feelings of ill-will or hostility between one or more sections of the community on the one hand and any other section or sections of the community on the other hand; or

(ii) feelings of ill-will towards, hostility to or contempt for any class of inhabitants of Trinidad and Tobago distinguished by race, colour, religion, profession, calling or employment; or

(e) to advocate or promote, with intent to destroy in whole or in part any identifiable group, the commission of any of the following acts, namely:

(i) killing members of the group; or

(ii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(2) But an act, speech, statement or publication is not seditious by reason only that it intends to show that the Government has been misled or mistaken in its measures, or to point out errors or defects in the Government or Constitution as by law established, with a view to their reformation, or to excite persons to attempt by lawful means

> the alteration of any matter in the State by law established, or to point out, with a view to their removal by lawful means, matters which are producing, or have a tendency to produce –
>
> (a) feelings of ill-will, hostility or contempt between different sections of the community; or
>
> (b) feelings of ill-will, hostility or contempt between different classes of the inhabitants of Trinidad and Tobago distinguished by race, colour, religion, profession, calling or employment.
>
> (3) In determining whether the intention with which any act was done, any words were spoken or communicated, or any document was published, was or was not sedition, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

15. Section 4(1) of the Act provides that a person is guilty of an offence who: (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; (b) communicates any statement having a seditious intention; (c) publishes, sells, offers for sale or distributes any seditious publication; and (d) with a view to it being published prints, writes, composes, makes, reproduces, imports or has in his possession, custody, power or control any seditious publication. Section 4(2) provides that a person guilty of an offence is liable (a) on summary conviction to a fine of $3,000 and to imprisonment for two years and (b) on conviction on indictment to a fine of $20,000 and to imprisonment for five years.

16. Section 9 of the Act provides that a person shall not be prosecuted under the Act without the written consent of the Director of Public Prosecutions ("DPP").

17. Section 13 of the Act provides that:

> "If a Magistrate is satisfied by information on oath that there is reasonable cause to believe that an offence under this Act has been or is about to be committed he may grant a search warrant authorising any police officer to enter any premises or place named in the warrant, with such assistance as may be necessary, and if necessary by force, and to search the

premises or place and every person found therein and to seize anything found on the premises or place which the officer has reasonable ground for suspecting to be evidence of an offence under this Act."

The judgments of the courts below

18. In his judgment dated 13 January 2020, Seepersad J held as follows:

(1) The language of section 3 of the Act was so broad as to confer a dangerously wide discretion on those who were empowered to enforce it (para 93).

(2) The vagueness and overly wide definition of seditious intent under section 3 of the Act lacked the requisite degree of clarity to qualify as law. The provisions offended the rule of law and had no place in a sovereign democratic State (para 100).

(3) Sections 3 and 4 of the Act imposed unreasonable and arbitrary restrictions on freedom of speech. They created the potential for abuse by prosecuting authorities and the arbitrary and subjective prosecution of persons expressing unpopular or disturbing opinions (paras 109 and 110).

(4) The intention to incite violence against lawfully instituted authority must be the foundation upon which any justifiable sedition laws are premised (para 114).

(5) Therefore, sections 3 and 4 of the Act were not clothed with the requisite legal certainty to qualify as law, with the result that section 6 of the Constitution could provide no protection (para 118).

(6) Section 1 of the Constitution provided an express, substantial and binding guarantee that the Republic of Trinidad and Tobago is a sovereign democratic state and section 6 of the Constitution could not protect existing laws which violate section 1 (para 144).

(7) Sections 3 and 4 of the Act were inconsistent with section 1 of the Constitution as they imposed disproportionate and unjustified restrictions on free speech, expression and thought. In addition, they violated the rule of law because they lacked certainty and were vague; and so their status as law could

not be reasonably justified in the sovereign democratic State of Trinidad and Tobago (para 165).

19. By an order dated 13 January 2020 Seepersad J made the following declarations:

> "(1) Sections 3 and 4 of the Sedition Act contravene the principle of legality and/or legal certainty, in that they are vague, uncertain and therefore illegal, null and void and they offend the rule of law;
>
> (2) Sections 3 and 4 of the Sedition Act infringe the right of the individual to enjoy freedom of thought and expression, the right to join political parties and express political views and the right to freedom of the press which are all rights which are tenets of a sovereign democratic state and individually or collectively these provisions infringe the binding declaration recorded at section 1 of the Constitution; and
>
> (3) Sections 3 and 4 of the Sedition Act are inconsistent and/or incompatible with the characteristics, features and tenets of a democratic state and pursuant to section 2 of the Constitution they are void to the extent of their inconsistency with the Constitution."

20. On the respondent's appeal, the Court of Appeal (Mohammed, Pemberton and Wilson JJA) allowed the appeal against the grant of that declaratory relief in a judgment given on 26 March 2021.

21. In summary the Court of Appeal held as follows:

> (1) the offence of sedition readily lends itself to the adoption by the trial judge of well-established common law principles which instruct the tribunal of fact (whether the jury or a judge) on the manner in which the case is to be assessed. This would militate against any strictures of the statutory provisions, which are couched in necessarily broad terms. The considerations which should be borne in mind include:
>
> > (i) that the tribunal must have regard to the context of the present day society and the issues facing the present day society;

(ii) that the mere use of tall and turgid language may not necessarily be offensive;

(iii) that the tribunal must not hold a person to account for something that might have been said in the heat of the moment; and

(iv) that there must be a certain level of latitude given to an accused and that the tribunal must give due accord to freedom of expression.

This approach does not undermine the statutory definition of sedition but rather, it promotes a balance between the public order and safety objectives of the legislation and the countervailing factor that appropriate scope should be accorded to freedom of expression (para 89).

(2) Properly interpreted in context and with the assistance of precedent, sections 3 and 4 of the Act do not violate the principle of legal certainty (para 90). On the contrary:

(i) they provide fair notice to citizens of the prohibited conduct;

(ii) they are not vaguely worded;

(iii) they define the criminal offence with sufficient clarity;

(iv) they are not couched in a manner that would allow law enforcement officials to use subjective moral or value judgments as the basis for their enforcement, and any such risk was alleviated by the requirement (in section 9 of the Act) for the written consent of the DPP for any prosecution.

(3) As to the challenge for inconsistency with the fundamental rights expressed at section 4 of the Constitution, the Court was bound by the decision in *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433. The savings clause at section 6 of the Constitution operates to save the Act, as "existing law", in its entirety (paras 98-99).

(4) Sections 3 and 4 of the Act are not lacking in certainty and clarity (para 103). The aspect of the rule of law which has been interrogated in this case, the principle of certainty, is one which exists at the "micro level", that is, which involves an exercise of interpretation. There are no deeper constitutional, structural issues implicated which require examination of the rule of law at a "macro", jurisprudential level. Two examples of the operation of the rule of law at a "macro level" would be the introduction of legislation to abolish general elections and the removal of the question of bail from the purview of the judiciary. The former would involve the violation of a core principle of sovereign democratic governance and the latter would violate the fundamental principle of the separation of powers. No such "macro level" issues are implicated in this challenge (para 106).

(5) In addition to the court's findings on legal certainty, the Act satisfied the fundamental requirements of "due process" under sections 4 and 5 of the Constitution by providing for two distinct safeguards:

> (i) The requirement for the consent of the DPP provides a critical filter. In March 2012 the Office of the DPP published "The Code for Prosecutors" (the Code) which sets outs transparently, the various factors which must be weighed in the balance in deciding whether to institute a prosecution. The Code provides that prosecutors must only decide to continue a prosecution when the case has passed through both stages of the "Full Code Test", which comprises the "Evidential Stage" and the "Public Interest Stage" (para 123); and
>
> (ii) The intrinsic nature of the trial process. For example, it is open to a defendant to apply for a permanent stay of the indictment on the basis that the prosecution constitutes an abuse of process. Also, at the close of the prosecution's case, there is the opportunity to advance a submission of no case to answer. Finally, the trial judge has the ability to ameliorate any strictures of the statutory definition of sedition by infusing the common law evaluative approach which would enable contemporary mores to be appropriately factored into account. The very nature of the offence of sedition, being one that is time, context and issue sensitive, readily permits such an approach, which allows the trial judge to suitably tailor his directions in a manner which ensures that contemporary attitudes towards freedom of thought and expression are accorded appropriate latitude and are duly factored into account by the tribunal of fact (paras 114 - 126).

(6) Section 1 of the Constitution is a solemn declaration of Trinidad and Tobago's status as a sovereign democratic state (para 137) but does not create fundamental rights and is not meant to give life to litigation alleging breaches of sections 4 and 5 (para 139).

(7) If it is argued that a law violates fundamental rights, the challenge must face the question, whether the law is saved by section 6 of the Constitution. Section 1 is not a fallback to be used where challenges under sections 4 and 5 are blocked by section 6 (para 140).

(8) Section 1 of the Constitution does not lend itself to challenges against laws on the grounds that they are vague and uncertain and offend the rule of law (para 142).

(9) Section 2 of the Constitution cannot be used to launch an attack on the effect of the savings clause at section 6 (para 148).

22. On 6 April 2021 the appellants applied for conditional leave to appeal to the Board. On 13 September 2021 the Court of Appeal granted final leave to appeal.

The Constitution of Trinidad and Tobago

23. The preamble to the 1976 Constitution states:

> "Whereas the People of Trinidad and Tobago –
>
> (a) 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, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator;
>
> …
>
> (c) have asserted their belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of the national life and thus

develop and maintain due respect for lawfully constituted authority;

…"

24. Section 1 of the Constitution provides that:

"The Republic of Trinidad and Tobago shall be a sovereign democratic State."

25. Section 2 of the Constitution provides that:

"This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

26. Sections 4, 5 and 6 of the Constitution provide as follows:

Section 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:

…

(e) the right to join political parties and to express political views;

…

(i) freedom of thought and expression;

(j) freedom of association and assembly; and

(k) freedom of the press."

Section 5

"(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms herein before recognised and declared.

…"

Section 6

"(1) Nothing in sections 4 and 5 shall invalidate—

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

…

(3) In this section—

…

'existing law' means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1)."

27. In *Chandler v State of Trinidad and Tobago* [2022] UKPC 19; [2023] AC 285, at paras 6 – 8, Lord Hodge helpfully set out the history of the Constitution of Trinidad and Tobago as follows:

> "6. The Constitution of 1962, which was set out in Schedule 2 to the Trinidad and Tobago (Constitution) Order in Council 1962 ('the 1962 Order'), came into effect when Trinidad and Tobago became an independent nation. The 1962 Constitution declared in section 1 the fundamental rights and freedoms which existed in the state. Section 2 provided that, subject to sections 3, 4 and 5 of the Constitution, no law shall abrogate, abridge or infringe any of those recognised rights and freedoms. Section 3 of the 1962 Constitution contained a saving provision for existing law. It stated that sections 1 and 2 of the Constitution 'shall not apply' in relation to any law that was in force at the commencement of the 1962 Constitution. The 1962 Order contained, in section 4, a modification clause which provided that the existing laws 'shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order'.
>
> 7. The 1976 Constitution was enacted by the legislature of the independent Trinidad and Tobago in the Constitution of the Republic of Trinidad and Tobago Act 1976 ('the 1976 Act'). Section 5 of the 1976 Act provides:
>
> > '(1) Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order-in-Council of 1962 but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act.'
>
> Section 2 of the 1976 Act defines 'existing law' as 'a law that had effect as part of the law of Trinidad and Tobago immediately before the appointed day'. The appointed day was 1 August 1976, which was the day on which the 1976 Constitution came into operation by Proclamation of the Governor General.

8. The 1976 Constitution is set out in Schedule 2 to the 1976 Act. …"

The issues on this appeal

28. The agreed issues before the Board are as follows:

(1) Can sections 3 and 4 of the Act (or parts thereof) be invalidated by reference to section 1 of the Constitution (independent of sections 4 and 5 of the Constitution)?

(2) If so, are sections 3 and 4 of the Act (or parts thereof) inconsistent with section 1 of the Constitution, and thereby rendered invalid by section 2, because they:

(i) are inconsistent with the essential characteristics of a parliamentary democracy;

(ii) offend the principle of legal certainty;

(iii) grant an unacceptably wide executive discretion; or

(iv) offend the rule of law?

(3) And if so, to what extent, or in what parts, are sections 3 and 4 of the Act rendered invalid?

(4) Alternatively, are sections 3 and 4 of the Act (or all parts thereof) sufficiently certain in effect so as to qualify as law, and therefore as "existing law" for the purposes of section 6 of the Constitution?

(5) And if not, and to the extent that they are not, are sections 3 and 4 of the Act thereby deprived of the protection of section 6 of the Constitution and rendered invalid by reason of their inconsistency with sections 4 and 5 of the Constitution?

(6) And if so, to what extent, or in what parts, are sections 3 and 4 of the Act rendered invalid?

(7) Whether sections 3 and 4 of the Act are existing laws and are therefore immune from judicial review on the basis of unconstitutionality?

29. At the hearing before the Board it became clear that those issues can be taken under two broad heads, in the following order:

(1) whether the relevant provisions of the Sedition Act are existing laws within the meaning of section 6 of the Constitution and are therefore protected from judicial review on the ground that they are incompatible with sections 4 and 5 of the Constitution (agreed issues (4) to (7)); and

(2) whether those provisions are unconstitutional on the ground that they are incompatible with section 1 of the Constitution (agreed issues (1) to (3)).

30. On behalf of the appellants, Mr Peter Knox KC makes two main criticisms of the Sedition Act. First, he submits that it is too vague and therefore is void for uncertainty. Secondly, he submits that it is overbroad because it is capable of catching legitimate – if sometimes robust – criticism of the Government and others. Mr Knox submits that the Act is not restricted on its face to speech which incites violence or disorder and, for that reason alone, is incompatible with modern concepts of a democratic society.

Development of the law of sedition

31. A helpful summary of the history of the law of sedition in the common law and in the statute law of various jurisdictions can be found in a report by the New Zealand Law Commission, Report No 96 "Reforming the Law of Sedition" (2007), chapters 1 and 4. For present purposes a brief summary will suffice.

32. Under the English common law there was no offence of sedition as such but there were offences which included the concept of sedition, for example the offence of seditious libel. The prosecution for seditious libel of people who used words that could urge insurrection against those in authority, or who censured public men for their conduct, or criticised the institutions of the country, was made possible by the *De Libellis Famosis* decision of the Star Chamber (1606) 5 Co Rep 125a. Even before this, in 1588, libel that had the effect of turning people against those in authority had been described as seditious libel: see *R v Knightly* (1588) 1 State Trials 1263. By the 1680s there were frequent prosecutions for political libel and seditious words for simply criticising the Government. Over the next three centuries, the speaking of inflammatory words, publishing certain libels, and conspiring with others to incite

hatred or contempt for persons in authority became known as seditious offences in England.

33. At one time the common law concept of sedition did not require there to be an intention to incite violence or disorder. As the Australian Law Reform Commission noted in its report "Fighting Words: A Review of Sedition Laws in Australia" (2006), at para 2.9, this reflected an "antiquated view of the relationship between the state and society". The law had emerged in a pre-democratic era.

34. In similar vein, the New Zealand Law Commission said: "In a democracy where, under democratic theory, the people govern themselves, it is hard to see how or why speech uttered against the Government should be a crime; not in a country that values free speech" (para 5 of the Summary). The New Zealand Law Commission recommended that the offences of sedition in sections 81-85 of the Crimes Act 1961 should be abolished.

35. During the course of the 19th century, however, the English common law began to include a requirement that there should be an intention to incite violence or disorder. This was achieved through directions given by trial judges to the jury: for example, in 1820, the judge in *R v Burdett* (1820) 4 B & Ald 95 told the jury that they were to consider whether an allegedly seditious paper was a "sober address to the reason of mankind, or whether it was an appeal to their passions calculated to incite them to acts of violence and outrage"; see also *R v Burns* (1886) 16 Cox CC 355. Sir James Stephen suggested that there should be such a requirement in his *History of the Criminal Law of England* (1883), at p 375, where he said that nothing short of direct incitement to disorder and violence is a seditious libel. This was referred to by Cave J in *Burns*.

36. In the 8th edition of Stephen's *Digest of the Criminal Law* (1950), he had drafted a proposed statutory definition of seditious intention, in Article 114, as follows:

> "Seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to

> promote feelings of ill-will and hostility between different classes of such subjects.
>
> An intention to show that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not seditious intention."

Draft legislation was also proposed by Commissioners who had drafted a proposed Criminal Code for England but that project never came to fruition. The definition which had been adopted by the Commissioners was taken almost verbatim from that found in Article 114 of Stephen's *Digest of the Criminal Law*. That draft legislation in turn influenced the legislation that was enacted in various colonies and dominions in the British Empire, for example Canada. It is significant that its language was also similar to the terms of the Sedition Act in Trinidad and Tobago.

37. In English law itself seditious offences remained common law offences. In 1977 the Law Commission of England and Wales expressed the provisional view that there was no longer a need for those offences: see its Working Paper No 72 "Treason, Sedition and Allied Offences", at paras 68-78. In due course, the Parliament of the United Kingdom abolished the offence of seditious libel by section 73(a) of the Coroners and Justice Act 2009. It was doubtless felt that the public policy interests which such offences served could be served by other offences which had been created in the meantime, such as anti-terrorism offences and the offence of incitement to racial hatred.

38. In colonies of the British Empire laws on sedition were enacted which were similar to the Sedition Act in Trinidad and Tobago. They appear to have been modelled on the Indian Penal Code, originally enacted in 1860 but amended in 1870 at the suggestion of Sir James Stephen, to include an offence of sedition. This was section 124A of the Indian Penal Code, which has continued to be in force in India since independence in 1947. In 1962 the Supreme Court of India held in *Kedar Nath Singh v State of Bihar* 1962 AIR 955 that this offence was not unconstitutional but that, when properly interpreted, it required either an intention to create public disorder or a tendency to cause violence.

39. In May 2023 the Law Commission of India, in its Report No 279 "Usage of the Law of Sedition", recommended that section 124A should be retained but with

amendments to clarify on the face of the legislation the requirements which had been imposed by the Supreme Court in *Kedar Nath Singh*.

40. The Canadian legislation on seditious libel was considered by the Supreme Court of Canada in *Boucher v R* [1951] SCR 265. The relevant provisions referring to seditious libel were sections 133 and 133A of the Criminal Code. At the material time, when the appellant (a Jehovah's Witness) had distributed what was alleged to have been a seditious pamphlet, section 133 stated that "a seditious libel is a libel expressive of a seditious intention" but the phrase "seditious intention" was not exhaustively defined in the legislation. Section 133(4) stated that:

> "everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any Governmental change within Canada".

But the subsection began with the words:

> "without limiting the generality of the meaning of the expression 'seditious intention'".

41. The main judgment for the majority was given by Kerwin J. At p 283, he said:

> "The intention on the part of the accused which is necessary to constitute seditious libel must be to incite people to violence against constituted authority or to create a public disturbance or disorder against such authority. To what is stated previously that 'the question is, was the language used calculated to promote public disorder or physical force or violence', there should be added that that public disorder or physical force or violence must be against established authority. An intention to bring the administration of justice into hatred or contempt or exert disaffection against it is not seditious unless there is also the intention to incite people to violence against it."

42. It is of some importance to note that the decision in *Boucher* came at a time before Canada enacted the Bill of Rights 1960. Accordingly, the decision was reached in accordance with ordinary principles of statutory interpretation, not by reference to a

code of fundamental rights. It is also of importance that Kerwin J was influenced by what Sir James Stephen had written in the 19th century, about the need for an intention to incite violence or disorder, and expressly noted the similarities between the Canadian legislation and Article 114 of the draft code which Stephen had drafted.

43. As has been noted above, the Sedition Act in Trinidad and Tobago also has those similarities. Nevertheless, Mr Knox submits that it is not restricted by the requirement of an intention to incite violence or disorder. The mainstay for this submission is the decision of the Board in *Wallace-Johnson v R* [1940] AC 231 (a case concerning the interpretation of similar legislation in force in what was then the Gold Coast). At pp 239-240, Viscount Caldecote LC, in giving the opinion of the Board, said that the words of the legislation were clear and unambiguous and there was no warrant for imposing a gloss of an intention to incite violence upon them. He said that the similarity in wording to Stephen's *Digest of the Criminal Law* was immaterial because conditions in the colony of the Gold Coast were different from those in England. This was at a time when the Gold Coast was not a democratic, self-governing state: it gained independence as Ghana in 1957.

44. The Board now has the advantage of being able to consider the decision of the Supreme Court of Canada in *Boucher*, which came some 11 years after *Wallace-Johnson*. In *Boucher,* at p 282, Kerwin J distinguished *Wallace-Johnson* in brief terms:

> "The decision of the Judicial Committee in *Wallace-Johnson v The King,* is not of assistance as there it was held merely that the provisions of the Gold Coast Criminal Code were clear and unambiguous and intended to contain as far as possible a full and complete statement of the law of sedition in the Colony and that, therefore, the English common law as expounded in the *Burns* Case was inapplicable."

45. It is also important to note that the decision of the Privy Council in *Wallace-Johnson* was decided many decades before the "principle of legality" became recognised in a series of decisions by the House of Lords in the 1990s, eg *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115. In one famous formulation of that principle, at p 131, Lord Hoffmann said:

> "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

46. It is to be noted that, in the present case, no prosecution was in fact brought and so the Board does not have the advantage of seeing any rulings by a trial judge or directions to a jury. The Board notes, however, what was said by the Court of Appeal as to the approach that should be taken by a trial judge if there were a prosecution, including the need to bear in mind contemporary mores and the importance of freedom of expression. The Board considers that weight should be given to the views of the Court of Appeal, which is closer to local conditions than it can be. It is therefore far from obvious to the Board that, if the compatibility of the Sedition Act had to be assessed by reference to the facts of a particular case, it would be given the wide interpretation which the appellants contend it must have.

47. To the contrary, the Board is of the opinion that, were such a case to arise, there would be much to be said for the proposition that, applying the principle of legality, and quite apart from any constitutional considerations, the true interpretation of the Act is such that there is implied into it a requirement that there must be an intention to incite violence or disorder. Indeed this appeared to be accepted on behalf of the respondent at the hearing before the Board.

Section 6 of the Constitution

48. In *Johnson v Attorney General of Trinidad and Tobago* [2009] UKPC 53; [2010] 4 LRC 191, at para 13, Lord Rodger said this about section 6 of the Constitution:

> "The effect of section 6(1) is that an 'existing law' is not to be invalidated by section 4 of the Constitution and is not to be regarded as inconsistent with the Constitution by reason of anything in section 4. To put the point another way, section 6(1) makes an existing law constitutional, ie, consistent with the Constitution even though it would conflict with section 4 if that section applied to it."

49. According to section 6(3), "existing law" means:

> "A law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution …"

Plainly therefore what that provision has in mind is a law which had effect at the relevant date, leaving aside anything contained in the Constitution. In the Board's view, the Sedition Act was clearly such a law, since it had effect as part of the law of

Trinidad and Tobago immediately before the commencement of the 1962 Constitution (now the 1976 Constitution). It was common ground that the amendments which have been made to the Act since then do not prevent it from falling within the definition of an "existing law".

50. To counter this obvious obstacle in his path, Mr Knox submits that, when section 6 refers to "existing law", the court is called upon to undertake an analysis of the "quality" of that law. In particular, he submits that, if the law is so vague as not to meet basic standards of legal certainty, it does not constitute "law" and therefore cannot be an "existing law" within the meaning of section 6.

51. The Board does not accept those submissions. In the Board's view, section 6 poses a straightforward, *factual* question: did the relevant law have effect as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution?

52. That straightforward interpretation of the language of the Constitution is reinforced by the consideration that, were it otherwise, there would be the risk of great legal uncertainty. In giving the judgment of the Board in *Chandler* [2023] AC 285, Lord Hodge explained the underlying rationale for the savings clause in section 6 of the Constitution, at para 72:

> "The introduction of such Constitutions in the absence of a savings clause, or with a savings clause which took effect only after the existing law had been modified so far as was possible by judicial interpretation, would have called into question the interpretation and application of existing statutes and laws and have risked creating substantial legal uncertainty. The legal challenges that might have arisen in the aftermath of the adoption of a written Constitution would have covered many areas of life and imposed a great burden on the courts to re-establish a degree of legal certainty."

53. In the Board's view in the present appeal, if Mr Knox' submission about the need to examine the underlying quality of laws were correct, there would indeed be great legal uncertainty created, as it would be possible to challenge many laws which were in truth, as a matter of fact, existing laws within the meaning of section 6 of the Constitution.

54. Some support for Mr Knox' submissions can be found in *Fundamentals of Caribbean Constitutional Law* by Tracy Robinson, Arif Bulkan and Adrian Saunders. In the first edition (2015), at para 6-017, it was said:

> "The general savings law clauses in Caribbean constitutions provide immunity from constitutional challenges, on bill of rights grounds, to certain existing laws. That clause generally precludes challenges to restrictions on guaranteed rights that are 'contained in any *law* in force immediately before the appointed day'. Arguably, to qualify as 'law' for these purposes, the existing law must meet the standard of legal certainty. Although this point is yet to be decided by Caribbean courts, it follows from the current application of the principles of legal certainty. The principle of legal certainty as an element of the rule of law is already considered relevant when courts are undertaking an evaluation of whether a law infringes a guaranteed right and must assess whether the restriction on the right serves a legitimate goal and is proportionate. A fortiori, legal certainty should apply to those instances in Caribbean constitutions in which a person is facing a categorical shut-out of fundamental rights through savings law clauses. No one should suffer the harsh effects of a savings law clause in relation to provisions that do not meet the criteria of legal certainty."

55. In the second edition (2021), at para 6-016, it is said:

> "The general savings law clauses in Caribbean constitutions ostensibly provide immunity from constitutional challenges, on bill of rights grounds, to certain existing laws. That clause generally precludes challenges to restrictions on guaranteed rights that are 'contained in any *law* in force immediately before the appointed day'. To qualify as 'law' for these purposes, the existing law must meet the standard of legal certainty. No one should suffer the harsh effects of a savings law clause in relation to legal provisions that do not meet the criteria of legal certainty, which is a dimension of the implied principle of the rule of law, that extends well beyond the constitutions' rights provisions. This argument made in the first edition of this book was accepted by the CCJ in *McEwan v AG*.

> Thus, there are two ways of conceptualising the role of legal certainty and the rule of law: one micro and the other macro. In the micro sense, a precondition for the application of the general savings law clause is that the existing law must be a law–that is, legally certain. This is a technical reading of the clause itself and the word 'law', having regard to the principle of legal certainty. The clause has no efficacy in relation to vague laws. The macro argument steps outside the bill of rights, where the general savings law clause on the face of its reign, and challenges the law on the non-bill of rights grounds; this leads to violations of the rule of law and its corollary principle of legal certainty."

56. One of the authors, Adrian Saunders, is President of the Caribbean Court of Justice ("CCJ"). As is mentioned in the second edition, the argument made in the first edition was accepted by that court in *McEwan v Attorney General of Guyana* [2018] CCJ 30 (AJ); 94 WIR 332, in which the main judgment was given by Saunders P. *McEwan* concerned the savings clause in the constitution of Guyana. The law under challenge was a provision in the Summary Jurisdiction (Offences) Act 1893, which made it an offence for a man to wear female clothing in a public place for an improper purpose. The CCJ unanimously allowed the appeal.

57. The difficulty with this argument is that it is inconsistent with the judgment of the Board in *Chandler*, in which *McEwan* was considered but not followed. In *Chandler* a nine-member panel of the Board considered whether to depart from the earlier decision in *Matthew* in the light of subsequent decisions of the CCJ, including *McEwan*, and held that it should not. As Lord Hodge explained in *Chandler*, although much of the reasoning in *McEwan* is consistent with the jurisprudence of the Board, not all of it is: see paras 41-48 and 71-75. In particular, in the Board's view, it is inconsistent with what Lord Hodge said about the importance of savings clauses in the interests of legal certainty, at para 72 (quoted above). Accordingly, the Board is unable to accept Mr Knox' submission, and the view expressed in *Fundamentals of Caribbean Constitutional Law*, in this regard.

Section 1 of the Constitution

58. On behalf of the Appellant Mr Knox advances seven propositions on section 1 of the Constitution.

(1) Under section 1 Trinidad and Tobago is a sovereign democratic State.

(2) Section 1 is a substantive provision and is not merely declaratory.

(3) In order for a representative democracy to function as such, freedom of political speech is essential, provided it is not used to incite violence or disobedience of the authority of the courts.

(4) This freedom is not merely a matter of individual right but it is one without which there cannot be a functioning Parliamentary democracy.

(5) Section 1 of the Constitution therefore overlaps with the rights to freedom of expression and association in sections 4 and 5 but goes wider than those rights.

(6) It is no answer to say that section 6 of the Constitution insulates pre-existing laws because that relates only to sections 4 and 5 and not section 1 of the Constitution.

(7) Further, it is no answer to say that there is a crossover between the concept of democracy and the right to freedom of expression.

59. The Board accepts some but not all of those submissions. In particular, as will be seen below, propositions (1), (2) and (6) are supported both by the text of the Constitution and by authority. The Board does not, however, accept the conclusion Mr Knox invites it to reach, that the Sedition Act is unconstitutional because it is incompatible with section 1.

The importance of freedom of expression in a democratic society

60. The Board acknowledges the importance of freedom of expression, in particular on political matters, in a democratic society.

61. Mr Knox reminded the Board that the US Supreme Court has held that a law may on its face be so overbroad that it is unconstitutional because it is liable to catch what is legitimate freedom of speech: see *Thornhill v Alabama* (1940) 310 US 88. Mr Knox also reminded us of the decision of the US Supreme Court in *NAACP v Button* (1963) 371 US 415, at 438, where Brennan J said that:

> "Broad prophylactic rules in the area of free expression are suspect. … Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

Brennan J emphasised that, since freedom of speech needs "breathing space" to survive, government may regulate in this area only with "narrow specificity": see p 433.

62. The American jurisprudence has found its echo in the decision of the House of Lords in *Simms* [2000] 2 AC 115, at p 125, where Lord Steyn said that the right to freedom of expression is "the primary right" in a democracy: "Without it an effective rule of law is not possible." At p 126, after citing American authorities, Lord Steyn said that:

> "freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a break on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country …"

Analysis of section 1 of the Constitution

63. Section 1 of the Constitution was introduced in 1976, when Trinidad and Tobago became a republic, and was not to be found in the Constitution of 1962.

64. Mr Knox submits that section 1 was copied from the Constitution of Mauritius of 1968. The equivalent provision in section 1 of that Constitution was considered by the Mauritian Supreme Court in *Vallet v Ramgoolam* 1973 MR 29. Mr Knox observes that, given the chronology of the dates, the drafters of the 1976 Constitution of Trinidad and Tobago must have had in mind how the equivalent provision had been construed by the Mauritian Court in 1973.

65. *Vallet* concerned an application for mandamus against the Prime Minister and Governor-General of Mauritius, requiring them to take action for the alteration of the date fixed by the Governor-General for the holding of a by-election relying on emergency legislation. The judgment of the Supreme Court was given by Sir Maurice Latour-Adrien CJ, Garrioch SPJ, and Ramphul J.

66. One of the arguments advanced by the applicant relied on section 1 of the Constitution of Mauritius: "Mauritius shall be a sovereign democratic state". The court observed that the Constitution of Mauritius, unlike some others, was distinctive in that adherence to democratic principles was expressed, not by way of a preamble, but as part of the enactments contained in the Constitution itself. The court said:

> "The result, it would seem, is that section 1 of the Constitution must be viewed not merely as an interpretative adjuvant in ascertaining, for instance, the policy of a statute, but as an express provision of the Constitution to which ordinary legislation must yield. Another result is that a competent court of law before which the validity of an enactment is impugned as repugnant to section 1 of the Constitution has not only the power but also the duty, just as in the particular instances provided for in Chapter II to which reference has been made, to test that validity by what it thinks are the standards of democracy applicable to this country."

67. Nevertheless, the court was careful to remind itself of "the crucial need for the court to impose upon itself some forms of restraint." In particular, the court had to remain conscious of the elementary necessity of keeping distinct the judicial and political fields. In the result, the application failed on the facts of that case.

68. The decision in *Vallet* was approved by the Board in *State of Mauritius v Khoyratty* [2006] UKPC 13; [2007] 1 AC 80, at para 19, where Lord Steyn said that the Board had been "impressed with the analysis of the decision of the Supreme Court on section 1 in the instant case as well as in the earlier decision of the Supreme Court in *Vallet v Ramgoolam* 1973 MR 29, 39-41, and respectfully agrees with these decisions."

69. At para 15, Lord Steyn said that section 1 of the Constitution was not "a mere preamble." It was not simply a guide to interpretation. It was an operative and binding provision. Further, at para 16, he noted that in 1991 section 47(3) of the Constitution was amended so as to make provision for a "deep entrenchment" of section 1 of the Constitution. Lord Steyn concluded that this was "an exceptional degree of entrenchment." At para 12 Lord Steyn said:

> "The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary."

70. *Khoyratty* itself concerned section 32 of the Dangerous Drugs Act 2000 and section 5(3A) of the Constitution, as inserted by section 2 of the Constitution of

Mauritius (Amendment) Act 1994. The effect of these provisions was that the court had no power to grant bail pending trial in an offence of drug dealing where the suspect had already been charged with or convicted of a similar offence. On a constitutional reference by the District Magistrate, the Supreme Court held that section 5(3A) represented an interference by the legislature into functions which were intrinsically within the domain of the judiciary and therefore infringed the provision in section 1 that Mauritius shall be a democratic state. The Board dismissed the state's appeal.

71. This was because the right to bail could not be abolished either by ordinary legislation or by a constitutional amendment which did not comply with the requirement of deep entrenchment in section 1: see para 16 (Lord Steyn) and, in similar vein, para 31 (Lord Rodger) and para 36 (Lord Mance). The basis of the decision of the Board in *Khoyratty* is therefore that there was a violation of the principle of the separation of powers, in particular the exclusive role of the judiciary in deciding whether to grant bail to a criminal suspect. This was explained by the Board in *Chandler* [2023] AC 285 at paras 85-91.

72. In *Khoyratty* [2007] 1 AC 80 Lord Steyn referred to the earlier decision of the Board in *DPP of Jamaica v Mollison* [2003] UKPC 6; [2003] 2 AC 411, on which Mr Knox placed particular emphasis in his submissions. In that case the respondent was convicted of a murder committed when he was 16 years old and was sentenced to be detained during the Governor-General's pleasure in accordance with section 29 of the Juveniles Act 1951. On appeal, the Court of Appeal ruled by a majority that the sentence was unconstitutional and that section 29 should be modified in accordance with section 4(1) of the Jamaica (Constitution) Order in Council 1962 to provide for detention at the court's pleasure. The DPP's appeal was dismissed by the Board. It was held that, by giving the Governor-General, an officer of the executive, the power to determine the measure of an offender's punishment, section 29 of the 1951 Act infringed the principle of the separation of powers which was implicit in all constitutions on the Westminster model.

73. In giving the opinion of the Board, Lord Bingham cited what Lord Diplock had said in *Hinds v The Queen* [1977] AC 195, at 212-213, in particular that what

> "is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution."

Later, at p 226, Lord Diplock said:

> "What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

74. In *Mollison*, at para 13, Lord Bingham observed that it

> "does indeed appear that the sentencing provisions under challenge in the *Hinds* case were held to be unconstitutional not because of their repugnancy to any of the rights guaranteed by sections in Chapter III of the Constitution but because of their incompatibility with a principle on which the Constitution itself was held to be founded."

75. Mr Knox submits that in *Mollison* there was clearly an overlap between the principle of the separation of powers and specific rights in the Constitution, in particular the right to a fair trial, but this did not prevent the Board from holding that the Jamaican legislation had to be construed in the way that it was, even though it was a pre-independence law.

76. It is clear, in the Board's view, that the reasoning of Lord Bingham was based on the principle of the separation of powers and not on incompatibility with any specific fundamental right in the Constitution of Jamaica; see also *Chandler* at paras 75-82. The Board simply did not have to consider the issue which it has to in the present appeal. Furthermore, the decision of this Board in *Mollison* was not concerned with an express provision such as that to be found in section 1 of the Constitution of Mauritius or section 1 of the Constitution of Trinidad and Tobago, establishing a sovereign democratic state. Rather it was based on an implicit principle of the separation of powers.

77. In the Board's view, section 1 of the Constitution of Trinidad and Tobago is concerned with *structural* features of the state which go to the essence of the way in which it is governed. Those structural features must be those of a sovereign and democratic state. In this appeal the Board is concerned in particular with the second of those features, the concept of a *democratic* state. The primary structural feature of a democratic state is that the people shall be able to choose their representatives and, at least indirectly, their government: see eg *Maharaj v Cabinet of the Republic of*

Trinidad and Tobago [2023] UKPC 17; [2023] 1 WLR 2870, at para 31, where Lord Richards said:

> "The essential characteristic of a representative democracy, whether at a national or local level, is that the representatives are chosen by popular vote. In a modern democracy, such as Trinidad and Tobago, all individuals have the right to participate in the popular vote, subject only to specified conditions and disqualifications. … It is also an essential element of any democratic form of government, whether at a national or a local level, that the electorate choose their representatives for a limited period. The right to vote out representatives is as important as the right to vote in representatives."

78. Another structural feature of a democratic society is the principle of the separation of powers, in particular that judicial functions shall be performed by the judiciary and not the executive. Although there may be an overlap between section 1 and the fundamental rights set out elsewhere in the Constitution, in particular in section 4 (although it should be noted that the right to vote in elections for the House of Representatives is not set out there but instead is to be found in section 51), in the Board's view, the extent of that overlap should be kept within proper bounds, otherwise there is a danger that the carefully calibrated structure of the Constitution will be undermined. If the savings clause in section 6 could too easily be circumvented by resort to section 1, that itself would be inconsistent with the democratic principles on which the Constitution is based. This is because it would remove a certain subject-matter from the province of the elected legislature and place it within the province of the unelected courts. In the Board's view, one of the functions of section 6 of the Constitution is to give Parliament the power to determine which pre-independence laws should be retained and which should not.

79. The Board's view derives support from what was said by Lord Hodge in *Chandler* [2023] AC 285], at para 32, where he summarised the jurisprudence of the Board as follows:

> "…
>
> (i) The 1976 Constitution, which the 1976 Act brought into effect, is the supreme law of Trinidad and Tobago. If anything in the 1976 Act had been intended to modify or qualify some provision of the Constitution, it would have been included in the Constitution itself.

> (ii) The savings clause, which is contained in the 1976 Constitution and which is not a transitional provision, makes existing laws conform with the Constitution by disapplying sections 4 and 5 of the Constitution to such laws.
>
> (iii) The Parliament of the independent Trinidad and Tobago decided in 1976 not to dispense with the savings clause which has this effect. …
>
> (vii) … the savings clause … is part of the supreme law of the state … which reserves to the legislature the power to determine whether and if so how to change any existing law to conform with the fundamental rights articulated in the 1976 Constitution and changing social attitudes."

80. The Board also considers that its view derives some support, by analogy, from its decision in *Matadeen v Pointu* [1999] 1 AC 98. At p 109, Lord Hoffmann said:

> "A self-confident democracy may feel that it can give the last word, even in respect of the most fundamental rights, to the popularly elected organs of its constitution. The United Kingdom has traditionally done so; perhaps not always to universal satisfaction, but certainly without forfeiting its title to be a democracy. A generous power of judicial review of legislative action is not therefore of the essence of a democracy. Different societies may reach different solutions."

81. At p 110, Lord Hoffmann continued:

> "There is no reason why a democratic constitution should not express a compromise which imitates neither the unlimited sovereignty of the United Kingdom Parliament nor the broad powers of judicial review of the Supreme Court of the United States. Instead of leaving it to the court to categorise forms of discrimination on a case by case basis and to concede varying degrees of autonomy to Parliament only as a matter of comity to the legislative branch of Government, the constitution itself may identify those forms of discrimination which need to be protected by judicial review against being overridden by majority decision."

82. In the Board's view, an analogy can be drawn in the present appeal. The 1976 Constitution has, in section 4, an express provision which protects the right to freedom of expression. It has, however, (by section 6) insulated existing laws from being incompatible with that right. Reading the Constitution as a whole, the Board does not think that it would be appropriate to give too expansive an interpretation to section 1 of the Constitution, which would have the effect of undermining the Constitution as a whole. It is not inherent in the democratic nature of the state that there should be judicial review of legislation on the ground that it is incompatible with the right to freedom of expression.

83. Furthermore, in *Chandler* the appellant submitted that section 1 of the Constitution imported substantive requirements based on the principle of the rule of law which overlapped with the provisions of sections 4 and 5 and which were not affected by section 6, but the Board rejected that submission: paras 93-95. Its reasoning emphasised the importance of reading the Constitution as a coherent whole. As Lord Hodge observed at para 94,

> "[t]he principle of the rule of law [argued to be inherent in section 1] must be considered in the context of the 1976 Constitution as a whole and the Constitution interpreted as a coherent whole. The aspects of the rule of law upon which [counsel for the appellant] relies are articulated in sections 4 and 5 of the 1976 Constitution. Those provisions are, as the Board has explained, disapplied by section 6 of the Constitution. It would undermine the coherence of the Constitution if that which section 6 has disapplied were nevertheless to be applied through the invocation of the principle of the rule of law."

Although the Board accepts, as explained above, that section 1 imports certain substantive requirements additional to those in sections 4 and 5, it remains the case that it is those sections which set out the detailed provisions in the Constitution regarding protection of freedom of speech. The coherence of the Constitution would be undermined if the substantive requirements inherent in section 1 were construed in accordance with Mr Knox' submissions as being so extensive as to overlap to a substantial degree with the provisions in sections 4 and 5, which would have the effect of subsuming and circumventing the specific regime set out in those sections, as read with section 6.

Australian decisions

84. Mr Knox placed reliance on two decisions of the High Court of Australia. The first is *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177

CLR 106, which concerned legislation enacted by the Commonwealth Parliament prohibiting broadcasting of political matters during elections. It is to be noted that the Constitution of the Commonwealth of Australia does not contain an express right to freedom of expression. However, the High Court of Australia was able to find an implied right to freedom of communication in the Constitution, at least in relation to public affairs and political discussion. This flowed from the very concept of representative democracy, which signifies Government by the people through their representatives: see paras 37-28 (Mason CJ).

85. Mr Knox also relied on the decision of the High Court of Australia in *Lange v Australian Broadcasting Corporation* [1997] 4 LRC 192. This case arose from an action for defamation by a former Prime Minister of New Zealand, who at the time was a member of the New Zealand Parliament. One of the grounds of opposition raised by the defendants was that the allegations had been published pursuant to a freedom guaranteed by the Australian Constitution to publish material in the course of discussion of political matters. At pp 205-206, the High Court confirmed that the Constitution of Australia protects the freedom of communication between people concerning political matters which enables the people to exercise their free and informed choice as electors. The court said that this does not confer "personal rights of individuals." Rather it precludes "the curtailment of the protected freedom by the exercise of legislative or executive power." It cited with approval the earlier decision in *Cunliffe v Commonwealth* [1995] 1 LRC 54, at 90, where Brennan J said:

> "The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control."

86. The Board does not accept Mr Knox' submission in this regard. The Constitution of Australia is very differently structured from the Constitution of Trinidad and Tobago. It does not contain an express right to freedom of expression. The High Court of Australia was able to find an implied right to freedom of expression which flowed from the structure of that Constitution and in particular its democratic nature. But there is no need to find a right to freedom of expression which is implicit in the democratic nature of the state in section 1 of the Constitution of Trinidad and Tobago, since there is an express right to it, to be found in section 4. Further, the Constitution of Australia does not contain the savings clause which is to be found in section 6 of the Constitution of Trinidad and Tobago and which has important implications, in the Board's view, for a reading of the Constitution as a whole.

Conclusion

87. For the above reasons the Board dismisses this appeal.