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OIL OVER TROUBLED WATERS: THE CONSTITUTIONAL IMPLICATIONS OF A PRESIDENTIAL PRE-TRIAL PARDON IN TRINIDAD AND TOBAGO

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I. INTRODUCTION

The Constitution of Trinidad and Tobago is in many ways different from those of its sister Commonwealth Caribbean islands. For example, its Bill of Rights provisions are drafted in a style which is more crisp than the free-flowing alternative of, say, Barbados.[1] Its Office of President, though ceremonial, performs very important constitutional functions which are "executive" in nature. For example, the President exercises his own deliberate judgment in the appointment of the Chief Justice and the Chairman of the Public Services Commission after consultation with the Prime Minister and the Leader of the Opposition.[2]

But what makes the Constitution of Trinidad and Tobago (*hereinafter, Trinidad*) manifestly unique from the others is its provision on Presidential pre-trial pardon. If the Privy Council's position is to be accepted,[3] the Trinidadian formula is "modelled" after the United States Constitution. It goes far beyond what pertains in the sister Commonwealth Caribbean islands. These provisions were to haunt the High Court of Trinidad in the recent case of *L. Phillip v. The Commissioner of Prisons*.[4]

This article seeks to discuss some of the daunting implications of the pre-trial pardon as decided by the High Court.

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1. *Compare* TRIN. & TOBAGO CONST., S. 54 with BARB. CONST., S.11.

2. *See* TRIN. & TOBAGO CONST., SS. 102 and 120(2). *See also* Re Alva Bain, Suit No. 3260 (H.C., Trin. & Tobago, 1987).

3. Phillips v. DPP, [1991] App. Cas. 23, 27 (P.C.) (appeal taken from Trin. & Tobago).

4. Suit No. 1337 [1990] decided on 30th June, 1992. At the Court of Appeal, Sharma and Ibrahim, Justices of Appeal, dismissed the appeal by the State, while Hamel-Smith, Justice of Appeal, upheld the appeal. It is expected that a further appeal will be lodged with the Privy Council, in England, for the final determination of this matter in view of the fact that it is one of great public importance.

II. THE CONSTITUTIONAL SETTING

Section 87 (1) of the Constitution of Trinidad provides as follows:

> The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof.

Sub-sections (2) and (3) then deal with the President's power of pardon *after* conviction.[5] Section 87(1) may be contrasted with section 78(i) and (ii) of the Barbados Constitution, the latter of which is premised upon a *prior conviction.*[6]

Trinidad had a wholesale re-enactment of its 1962 independence Constitution in March 1976, based on a report of a Constitution Commission that presented its recommendations to the then Governor-General on January 22, 1974. It is instructive to note that neither the Majority Report nor the Minority Report touched upon the vexing question of the President's power to grant a pre-trial pardon. The President's power to "pardon" was indeed mentioned in one

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5. TRIN. & TOBAGO CONST., S. 87:
(2) The President may—
(a) grant to any person convicted of any offense against the law of Trinidad and Tobago a pardon, either free or subject to lawful conditions;
(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offense;
(c) substitute a less severe form of punishment for that imposed by any sentence for such an offense; or
(d) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to the State on account of such an offense.
(3) The power of the President under subsection (2) may be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister.

6. BARB. CONST., S. 78:
(1) The Governor-General may, in her Majesty's name and on Her Majesty's behalf—
(a) grant to any person convicted of any offence against the law of Barbados a pardon, either free or subject to lawful conditions;
(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
(c) substitute a less severe form of punishment for that imposed on any person for such an offence; or
(d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.
(2) The Governor-General shall, in the exercise of the powers conferred on him by subsection (1) or of any power conferred on him by any other law to remit any penalty or forfeiture due to any person other than the Crown, act in accordance with the advice of the Privy Council.

sentence; the remaining discussion concerning the executive power of mercy.[7] The Commission stated:

> Functions of the President
>
> All executive authority shall be vested in the President to be exercised by him directly or through persons subordinate to him in accordance with the Constitution. The Supreme Command of the Defence Forces shall also be vested in him. *The power to pardon and grant clemency which will be discussed in detail later will be exercised in his name.*[8]

The later discussion referred to above is in fact set out in paragraph 300 of the Majority Report:

> The Executive Power of Mercy
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> As has already been mentioned in the Chapter on the Head of State we recommend that the power of mercy should be exercised by the President. He will act in accordance with the advice of a Minister designated by the Prime Minister.[9]

Clearly the above discussion could not have related to a presidential pre-trial pardon, since that power is exercisable by the President in his absolute discretion and not on advice.[10]

III. THE MEANING OF A PARDON

It is unsettled among legal scholars as to what a pardon really means. Professor Stanley Grupp argues that the concept of pardon is understood and used in various ways, often in accordance with the particular interest of the writer.[11] Professor Ralph England prefers to define a pardon by the various forms which it can take:

> (i) release of a prisoner unconditionally with full restoration of civil rights,
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> (ii) release of a prisoner conditionally without such restoration, and
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> (iii) restoration of rights after the expiration of the sentence.[12]

Professor Jensen, on the other hand, takes the line of least resistance when he says that the term pardon is used in a "generic sense" and

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7. TRIN. CONST. COMMISSION, MAJORITY REPORT, S. 159.
8. *Id.*
9. *Id.* at S. 300.
10. *See* TRIN. & TOBAGO CONST., S. 87(1).
11. Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963).
12. Ralph England, *Pardon, Commutation, and Their Improvement*, 39 THE PRISON JOURNAL 23 (1959).

invites all of the various forms of clemency.[13] It appears that a popular working definition is to conceive of a pardon as constituting "the complete remission of any legal consequences emanating from a particular crime—an act of grace and a remission of guilt." The notion of "remission of guilt" does not sit well with a pre-trial pardon where guilt would not have been established but those definitional difficulties need not detain us here. In other words, ordinarily a pardon presupposes a trial and a condition.

IV. THE COMMON LAW BACKGROUND

The sovereign's power to pardon appears to be well-rooted in deep antiquity and in the common law. Apparently, by the time of Henry VII's reign in England, the common law had settled on the principle that the sovereign was vested with the authority to pardon persons accused or convicted of crime and that his power was absolute.[14] Lord Chief Justice Coke provided some further explanation which seemed to have sewn the seeds of executive pardon firmly in the common law. According to him, the sovereign had great discretion and leeway in the exercise of his power and his pardon could be "either absolute, or under condition, exception, or qualification."[15]

The transplantation of this common law doctrine into the United States Constitution in Article II (2) was said to have been done with little or no debate.[16] However that may be, such power of pardon was given early judicial and academic recognition. In 1788, Alexander Hamilton was able to offer a justification for this power in the sovereign:

> The principal argument for reposing the power of pardoning . . . [in] the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of a pardon to the insurgents or rebels may resume the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.[17]

It is important to understand the context in which this power came to be recognized in law. Alexander Hamilton was reflecting on the power of the chief executive in granting a pardon in a situation arising out of a civil war situation: what he calls "seasons of insurrection or rebellion."

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13. Christian Jensen, *Pardon*, 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 570 (1933).

14. *See* Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963). *See also* A.S. Miller, PRESIDENTIAL POWER IN A NUTSHELL, at 307 (1977).

15. E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, at 233 (1817).

16. M. FERRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (1911).

17. THE FEDERALIST NO. 74, at 465 (Alexander Hamilton).

In recent times, that important contextual setting has not been given much prominence; if anything, it has been virtually ignored. The basis of that power was indeed *diluted* recently in the case of *Murphy v. Ford*[18] in which the validity of the pardon granted to former President Nixon by President Ford was challenged. Chief Judge Fox reiterated the position that the constitutional power of the President to grant reprieves and pardons for offences against the United States is unlimited, except in cases of impeachment, and that want of an indictment or conviction did not affect the validity of the pardon. In *United States v. Wilson,*[19] Chief Justice Marshall stated that a pardon was "an act of grace, proceeding from the power entrusted with the execution of laws."[20] The shift from viewing a pardon as an act of grace to one of public welfare was made in *Biddle v. Petrovich,*[21] where Mr. Justice Holmes, in a significant shift from the common law, made it clear that a pardon is an act for the public welfare and not a private act of grace for an individual happening to possess power. The implications of this shift as well as the contextual milieu in which the power of pre-trial pardon came to be founded would become significant when we come to analyze the decision of Judge Brooks in *L. Phillips v. Commissioner of Prisons.*[22]

American constitutional jurisprudence has recognized and continues to recognize that the pardoning power of the President is very wide. As stated in *Ex parte Garland,*[23] the President's power under Article II (2) extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.[24] A full pardon erases the act and its legal consequences so that "in the eye of the law the offender is as innocent as if he had never committed the offence" and restores the offender to "all his civil rights."[25]

Judicial limitations on this extensive presidential power have been very few indeed. One establishes that a presidential pardon

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18. 390 F. Supp. 1372 (1975).
19. 32 U.S. (7 Pet.) 150 (1833).
20. *Id.* at 160.
21. 274 U.S. 480, 486 (1927).
22. *See supra* note 3.
23. 71 U.S. (4 Wall.) 333, (1867).
24. U.S. CONST., art. 2, § 2.
25. *See* Ex parte William Wells, 59 U.S. (18 How.) 307 (1855) (power to pardon conditionally as well as absolutely). *See also* Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1871) (power of pardon to commute sentences); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (power of pardon to grant amnesty to specified classes or groups); Illinois Central R.R. v. Bosworth, 133 U.S. 92 (1890) (power to pardon encompasses the capacity to remit fines and forfeitures).

could not compensate an offender for personal injuries suffered by imprisonment nor could such a pardon affect rights which have vested in others on account of the judgment against an offender.[26] Another limitation states that however large the power of pardon possessed by the President, and however extended its application, it cannot touch money in the Treasury of the United States, except as expressly authorized by act of Congress.[27]

A review of the background of the power has been necessary because, in the words of Lord Ackner:

> the power given to the President to grant a pardon *before* a person is charged with any offence and before he is convicted is a new power . . . modelled on the pardoning power given in the United States Constitution to the President of the United States.[28]

It remains then to see whether those principles influenced the decision of the Trinidad High Court in the *Muslimeen* case.

V. THE MUSLIMEEN TRIAL

The High Court trial which is the focus of this discussion was the culmination of a directive issued by the Privy Council in two consolidated appeals from two judgments of the Court of Appeal of Trinidad. Those appeals raised constitutional questions on the one hand and a *habeas corpus* claim on the other.

On 27th July 1990, members of the Jamaat Ali Muslimeen, of which the appellants were members, occupied by force of arms the House of Representatives and the premises of the Trinidad and Tobago Television Company. They held captive the Prime Minister and a number of members of Parliament together with some television company executives. Negotiations for the release of the captives were conducted through the agency of Canon Clarke of the Holy Trinity Cathedral who had been requested by the State to act as mediator. The State Authorities included the Acting President, the Deputy Prime Minister and a number of Senators and leaders of the army and the police. On the day after the insurrection started, the Acting President granted a pardon in the form of a general amnesty to the appellants. The terms of the pardon read as follows:

> I, Joseph Emmanuel Carter as required of me by the document headed Major Points of Agreement hereby grant an amnesty to all those involved in acts of insurrection commencing approximately 5.30 p.m. on Friday 27th July 1990 and ending upon the safe return

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26. Knote v. U.S., 95 U.S. 149 (1877).
27. *Id.* at 154.
28. *Supra* note 5.

> of all Members of Parliament held captive on 27th July 1990. This amnesty is granted for the purpose of avoiding physical injury to the members of Parliament referred to above and is therefore subject to the complete fulfillment of the obligation safely to return them.[29]

The hostages were subsequently released. Thereafter, the appellants were arrested and detained in the custody of the State. They were charged with treason, murder, assault and various other offences allegedly committed while the appellants were jointly involved in the alleged acts of insurrection.

The Muslimeen claimed they could not lawfully be arrested, charged or prosecuted by the State for offences encompassed by the pardon. Their application to be released on a *habeas corpus* writ could not, in the view of the Trinidad Court of Appeal, be granted without a successful "plea in bar" being made upon their arraignment on indictment. The Privy Council thought otherwise. In a passage condemning the slow wheels of justice, the Privy Council said:

> It is unfortunate that the application for *habeas corpus* did not receive the painstaking consideration given to the Constitutional Appeal. If this application had been taken first it might have been more readily appreciated that the appellants had made out a clear *prima facie* case that they were unlawfully imprisoned and therefore entitled to the writ as of right. The court has no discretion to refuse it. A *prima facie* case having been established that the appellants were unlawfully detained, it was clearly for the respondents to make a return justifying the detention. The appellants are not to be deprived of this fundamental right by the existence of some alternative, but in the circumstances, wholly unsatisfactory remedy. No civilized system of law should tolerate the years of delay contemplated by the court below, before the lawfulness of this imprisonment could be effectively challenged.[30]

Another important factor which weighed with the Privy Council was that "the decisions in the court below proceeded upon the assumption that the pardon was a valid one."[31]

This passage, it is submitted, thus opened the possibility of a subsequent challenge to the pardon on legal grounds. That possibility was seized upon by the State in the High Court trial before Judge Brooks. The State argued, *inter alia*, that the said document of pardon was not a pardon in law because of unlawful pressure.

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29. *See supra* note 3.
30. *Id.* at 13-14.
31. *Id.*

However, this did not persuade the trial judge who held the contrary after evaluating the affidavits of the respective parties.

VI. CRITIQUE

A number of disquieting features attend this case. It is regrettable that in arriving at its decision, the High Court (of Trinidad and Tobago) relied principally on an evaluation of the facts to the relative exclusion of supporting legal reasons. In a case of such moment, bristling as it were with legal issues of great complexity, it is indeed regrettable that the High Court chose to dispose of the matter merely "on a consideration of all the facts" as to whose affidavits were to be believed.[32]

Simeon McIntosh, in an article on this case,[33] has offered some criticisms of the approach and conclusions reached by the trial judge, noting that the Court turned the burden of proof on its head by requiring the state to establish "the legality of the Executive actions" rather than requiring the prisoners to establish that they had a valid pardon.[34] The State's obvious duty was to establish "duress" since that claim was raised "as an affirmative defence to the applicants' plea"[35] and not to justify the legality of the President's action. Mr. McIntosh also challenges the foundations of the conclusion reached by the court that the amnesty was not actuated by duress.[36]

As the Federalist Papers show, the origins of the American President's power to grant a pre-trial pardon lay in the situation of a civil war when the American nation was divided against itself. That important context was missed in the situation in Trinidad. Trinidad was not at war with itself, nor was the insurrection based on anything near a civil war. This was a case of a group of dissidents taking up arms to challenge the constitutional foundations of the state.

More importantly, it must be acknowledged that in no sense is the power of pre-trial pardon vested in the President of Trinidad as extensive as, or coterminous with that of the President of the United States of America. As is well-known, the President of Trinidad is not an executive President in the same sense as the President of the United States of America. For that reason, any comparison of their powers without regard to the contextual framework provided by the Constitution is not only dangerous but could lead one into a patent

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32. *See supra* note 3.

33. Case Comment, *The Yasin Abu Bakr Case: A Dissenting View*, 2 CARIBBEAN L. REV. 1 (1992).

34. *Id.* at 4.

35. *Id.* at 4.

36. *Id.* at 15-22.

error. It appears, therefore, that Lord Ackner's *obiter dictum* in which he likened the power of the President of Trinidad to that of the President of the United States is inaccurate *without serious qualification.* That leaves open the question of whether the Constitution of Trinidad envisaged that finality and unrenewability would attend the exercise of the President's power of pre-trial pardon. It may well be that Lord Ackner's unexplained *obiter dictum* may have led Judge Brooks into treating the two powers as equivalent to each other.

In this author's view, the High Court also failed to weigh considerations of public policy in arriving at its conclusion. Admittedly, the respondents did not provide an altogether coherent defence, since in a sense they argued against their own case of duress by showing through the affidavits filed that the President had taken counsel and had considered other alternatives before settling on the pardon document. Nevertheless, the signal from Judge Brooks' decision to potential coup-makers is not only patently clear but also ominous. Under the Constitution, the courts in Trinidad are duty-bound to uphold the rule of law. In fact, they have said so repeatedly. They have also claimed to be the guardians of the Constitution.[37] To enforce agreements such as occurred in the Muslimeen case is to validate the rule of *force* over the rule of *law.* The very apposite words of Judge McDonald in the case of *United States v. McBride*[38] bears repetition:

> It is clear that an individual may not, by threatening innocent citizens, extract a promise from that government and then use the courts to immunize himself or anyone else from prosecution. In the exercise of the court's supervision over the criminal justice system, "[public confidence in the fair and honorable administration of justice upon which ultimately depends the rule of law, is the transcending value at stake." [citations omitted] To enforce the agreement with McBride would effectively ratify the defendant's illegal actions rather than uphold the rule of law.[39]

Those ringing words on the rule of law found no place in the judgment of Judge Brooks.

In a sense the problem which Judge Brooks faced goes far beyond constitutional law alone. It raises also questions of criminal law and contract law. The *nice* question at stake is whether the State is bound to fulfill promises to hostage-takers, or whether it can rescind such promises with impunity? Admittedly, some American decisions

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37. *See* Collymore v. A.G. of Trinidad & Tobago, 12 W.I.R. 5 (1967).
38. 571 F. Supp. 596 (S.D. Tex. 1983).
39. *Id.* at 618.

have sought to rationalize the position by arguing that the State ought not to be allowed to resile from its promises because there is an alleged agreement between the parties which ought to be enforced.[40] With respect to the American decisions, to speak of an agreement in the circumstances such as occurred in the Muslimeen case is so artificial and unreal that it is hard to contemplate any West Indian Court using that as a *basis* for its conclusion. Indeed, if there was a contract, it would be quite easy to argue that to enforce such an agreement would be contrary to public policy.[41] The public interest demands that government should not be blackmailed. But the contractual theory falters on yet another ground. As Corbin states:

> forbearance to commit a tort or a crime is something that is required of all by public law. Such forbearance is not a sufficient consideration for a return promise.[42]

The most extraordinary thing happened when the court upon granting the Constitutional motion as well as the application for habeas corpus reconvened *suo motu* to consider the grant of a stay of execution of that same order. Both sides agreed that such a stay could not be granted. Accordingly, a Stay of Execution was refused. But that raises an additional question: Whether in addition to the Constitutional motion, a *habeas corpus* application was necessary at all? Under the Constitutional motion, the court had power to make consequential orders as it saw fit to cover the very ground that the writ of *habeas corpus* sought to achieve. Section 14 of the Trinidad Constitution gives the High Court original jurisdiction to hear and determine any application founded on a breach of the Bill of Rights and to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of those provisions.

Suffice it to say that recently in England the foundations of the writ of habeas corpus are being vigorously assailed. The old rave reviews to the effect that the writ of habeas corpus is the "most renowned contribution of the English common law to the protection of human liberty"[43] have given way to doubts as to its continued existence because in terms of relief, *certiorari* and declarations achieve almost all that the writ of habeas corpus can. It is also no argument

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40. David McCord, *Bargaining With Bad Guys: Is the Government Bound to Fulfill Promises Made To Secure the Release of Hostages?*, 2 U. ARK. LITTLE ROCK L.J. 435 (1988). I am grateful to Mr. Carl J. Lawrence, a second year student in the Faculty of Law, for drawing my attention to this article.

41. Chesire, Fifoot and Furmston, LAW OF CONTRACT, S. 11 (11th ed.).

42. CORBIN ON CONTRACTS, S. 189, at 173 (1963).

43. DE SMITH & EVANS, JUDICIAL REVIEW OF ADMINISTRATION ACTION, at 506 (4th ed. 1985).

to say that habeas corpus is the only public law remedy to which the Crown and its servants are subject to: ". . . a stay of proceedings may be obtained against the Crown and [that] ministers of the Crown are subject to the contempt of court jurisdictions."[44]

The abolition of the writ of habeas corpus may be too radical for the present evolutionary state of Caribbean Public Law, but the fact that the question is being legitimately raised in England means that this writ will be carefully watched by students of Public Law in the Commonwealth Caribbean. Perhaps the Court of Appeal in Trinidad will in its deliberations over this case restore some balance in favour of the Rule of Law even if for many *practical* reasons, the decision of Judge Brooks may not be overturned.

44. A.P. Le Sueur, *Should We Abolish the Writ of Habeas Corpus?*, 13 PUBLIC LAW 17 (1992).