COMMENTARY: THE CANADIAN JUDICIAL COUNCIL'S INQUIRY COMMITTEE REPORT

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When the administration of justice is brought into question, the very foundations of our political system are in fact questioned thereby. The issue, if not addressed in due course, may produce a crisis of legitimacy. This in fact has happened in the Donald Marshall, Jr. affair.

I have been asked to provide a short submission on that well-publicized case and more specifically, to comment on the Report to the Canadian Judicial Council of the Inquiry Committee.[1] The Committee's mandate was to review the judicial conduct of the five Nova Scotia Court of Appeal justices involved in the ultimate acquittal of Marshall.

As I was contemplating my response, a recent morning's newspaper caught my attention with two very different pieces of information. One was the report of the Moncton school board case, and the other the death of Friedrich Dürrenmatt – and both of them, in their different ways, have a bearing on the subject of this discussion.

The Moncton matter will still be fresh in the minds of readers: a public school teacher, Malcolm Ross, was accused of teaching hatred against Jews, and the family of a Jewish girl claimed that the Moncton school board, by not dismissing or re-assigning Ross, was colluding in making life miserable for the girl. Fellow students, apparently eager pupils of their racist teacher, had been persecuting her as a "Jew-bitch" who "deserved to die." Counsel for the school board, while professing sympathy for the plaintiff, nonetheless argued that the real victim of this whole affair was not the girl but her assailants – children from broken, poor homes who let their frustrations out against a girl who came from a good home and was secure in the love of her parents. The assailants were the real victims, counsel said, and not the plaintiff, an argument well known to judges and juries in rape trials: not the accused rapist but the victim is said to be blameworthy, for she led the poor, helpless man on by her seductive behaviour.

These are classic cases of role reversal: the victim is the real assailant, and the assailant the real victim. The application to the instant case will be made shortly.

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[1]*Report to the Canadian Judicial Council of the Inquiry Committee established pursuant to subsection 63(1) of the Judges Act at the request of the Attorney General of Nova Scotia*, August 1990 [hereinafter the *Inquiry Committee Report*].

The death of Dürrenmatt brings to mind his sharp and often bitter critique of how society handles the dispensation of justice. The author's latest play is in fact called *Justice,* and its theme too has a bearing on the matter before us: Justice, says Dürrenmatt, is not an abstract which is translated into fact by dint of impartial persons. Rather, by relying on judges, as it must, justice assumes the coloration of their experience. Since judges will generally stem from the same environment and have the same cultural likes and dislikes, they belong willy-nilly to a kind of club and in the long run their judgments will reveal this rarely talked-about fact.

The last drama by the Swiss playwright was, needless to say, highly controversial, for people would rather retain their image of the judiciary as totally above the fray. Here we come yet another step closer to the core of our discussion.

We are asked to comment only on the *Report* of the Inquiry Committee, and neither on the Reference Court decision[2] nor on the findings of the Royal Commission.[3] In fulfilling this limited assignment I take my cue from the statement of Chief Justice Allan McEachern, that judges are free to say what they believe serves the cause of justice, but that, once they deliver their verdict, they hand it over to the public for its untrammelled comment. I will therefore treat the *Report* of the Inquiry Committee in the light of that observation, for its members acted in a judicial capacity.

In my opinion, the *Report*, while well and clearly argued, does not go far enough because it leaves unsaid what should have been included. I say this with the greatest respect to its members, but I do not believe that they fully utilized their opportunity to let the public share in some uncomfortable truths – matters which, to me, are illustrated by the Moncton case and by Dürrenmatt's *Justice*. I believe that role reversal is a serious aspect of the instant case, and so are cultural prejudgments. While the former finds mention in the Inquiry Committee *Report*, it is absent from the Reasons of the Chairman, and the cultural context of the case is glaring by its omission by both the majority and the minority.

I do not argue that the judges of the Reference Court should have been removed; I do argue that the reasons given by the majority of the Committee left unsaid what in the 1990s should no longer be passed over in silence. In making my case I have had access only to the *Report* and not the findings of the Royal Commission; if the latter already dealt with this matter, so much the better for having said it, and if it did not it is high time that the issue be aired.

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[2] *R.* v. *Marshall* (1983), 57 N.S.R. (2d) 286 [hereinafter the *Reference*].

[3] *Royal Commission on the Donald Marshall, Jr. Prosecution*, Province of Nova Scotia, 1989 [hereinafter the *Royal Commission*].

One other source of information was available to me, and that was the media publicity which attended the Donald Marshall matter. It left me with one clear and lasting impression: that Marshall was a native person and that as such he got the short end of the stick called "Justice."

Not that this was a surprise; it was not. After serving for seven years on the Ontario Human Rights Commission, I have come to understand that there are various kinds of justice: one is taught in law school and is an exercise in legal reasoning; another is practised by the cultural and social majority which controls the system of justice; and a third is meted out to certain minorities amongst whom are first and foremost our Native people.

Members of the judicial establishment will vigorously deny the existence of such distinctions, but once one begins to confront the uneven struggle for human rights in our country one cannot help but be struck by the fact that cultural prejudice is deeply ingrained in our social fabric. It is this recognition that I find lacking in the *Report*.

In fact, the document reads like an earnest and well-constructed exercise in abstract principles. Thus we are treated to a consideration of what constitutes the limits of "legal error." Had I not been following the media, I might never have realized that Marshall was a Native person, for it would be easy to overlook the remark of Ebsary and MacNeil, "We don't like niggers and Indians."[4] In what follows, we deal with abstract human beings, not people of flesh and blood, with their likes and dislikes, preferences and prejudices.

To be sure, legal argument does of necessity proceed by abstraction, and the motivations of the participants, both on the Bench and in the court room, are of little concern. Therefore, I did not expect the *Report* to examine the motives of the judges of the Reference Court – an impossible as well as improper procedure. Besides, the Inquiry Committee had a very narrow task before it, namely, to recommend whether or not certain judges should be removed from office. Still, I would have hoped that in the process, it might have said something of the social and psychological context of the Reference Court's judgment.

I will therefore try to note some aspects which the *Report* passed over. I do this with the greatest respect for the Canadian judiciary and I assign no improper motives to any participant. After all, Donald Marshall was acquitted by the Court. My comment is addressed to the *obiter dicta* and is therefore of a general, one might say generic, nature.

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[4] Report of Inquiry Members Richard C.J., Laycraft C.J., Abella and Bellemarre, *supra*, note 1 at 5.

Marshall, at the time of the fatal incident, was 17 years of age; I do not know of his schooling, nor of his level of intellectual comprehension. If he was an average Native boy of his age, he had a less than clear understanding of the White man's legal system and, to boot, harboured a fairly deep-seated suspicion that he might not obtain justice in the White man's court.

If he withheld information from his counsel it was done most likely because he was not sure that he could trust even him; after all, counsel are "officers of the court"; and though Marshall probably did not know the term, the dress and comportment of counsel make it clear that they are in some fashion part of the system. Having myself, in my own youth, lived as a member of a condemned class, I believe I can understand the young boy's basic mistrust. In addition, my experience on the Human Rights Commission has amply demonstrated instances of this kind.

I would have liked the *Report* to have exposed something of this background, for it is not only the accused who was caught in the web of social misperceptions, it was the justice system itself.

The *Report* is aware of this fact. It criticizes, in measured and careful language, the fact that the Court put most of the blame on Marshall and that it "was not responsive to the injustice of an innocent person spending more than ten years in jail."[5] And it does take strong exception to the *obiter* remark that any miscarriage of justice was "more apparent than real."[6]

What lies behind this reversal of roles (despite the acquittal)? What caused the Court to deliver itself of such language – language which in his Reasons Justice McEachern calls "a bad mistake in the choice of words, but that is all it was"?[7]

I would have liked the *Report* to have delivered itself too of some *obiter dicta*. For instance, it might have said that such remarks are really not all that surprising, given the perception which White people often have of Native persons: that they are not to be trusted, that they lie and that, given half a chance, they will get drunk and probably commit some crime. After all, goes this popular wisdom, Native people fill our jails in disproportionate numbers.

Translated into the instant case, this amounts to saying that a man like Marshall really deserved what he got, for if he had not been convicted of murder,

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[5] *Ibid.* at 34.

[6] *Ibid.* at 32.

[7] Report of McEachern C.J., *supra*, note 1 at 26.

he would have landed in the slammer anyway, because of attempted robbery or something like that. Sooner or later, that's where he would have ended up, so what's the big deal? He served for the wrong reason, to be sure, but the final outcome would not have been much different, which means that any miscarriage of justice "was more apparent than real."

No wonder, then, that the chief blame for the whole incident was affixed not to the two White men "from Manitoba," nor to the police who withheld crucial evidence, but to Marshall himself. This is a typical case of role reversal, which exculpates the majority at the expense of a minority. I would have liked the *Report* to have given us something of this context.

As for the reasons of Justice McEachern, they partake of the shortcomings of the majority report and, in addition, present in essence a defence of "The System." This operates well enough when all parties are equal, but they were not in the Marshall case. Members of Dürrenmatt's "club" may see little wrong with that; I do.