THE JUDGED AND THE JUDGING: LOCATING INNOCENCE IN A FALLEN LEGAL WORLD

M.E. Turpel*

> Law, says the judge as he looks down his nose,
> Speaking clearly and most severely
> Law is as I've told you before
> Law is as you know I suppose
> Law is but let me explain it once more
> Law is the Law
>
> W.H. Auden[1]

> There has never been any rule of law or practice limiting the right of a judge in court or in Reasons for Judgement from saying what he or she thinks should be said even though he or she may decide for any number of reasons not to criticize others who may also deserve critical attention.
>
> Chief Justice Allan MacEachern[2]

The Law[3], when detected to have failed, indeed in a most tyrannical and inexcusable way – by victimizing the victim and chastising the innocent – has responded most often not with repentance but with denial, self–forgiveness and, predominantly, rationalizing. Such is the twisted and now familiar story of the Marshall judges,[4] *MacKeigan* v. *Hickman*[5] and the Judicial Inquiry Committee[6] entrusted with the task of reviewing judicial conduct in the aftermath of the report of the *Royal Commission on the Donald Marshall, Jr., Prosecution*.[7] A bifurcating

---

*Faculty of Law, Dalhousie University, Member Indigenous Bar Association.

[1]Excerpt from Poem 48, *Selected Poems* (New York: Vintage Books, 1979) at 89-90.

[2]Chairperson, *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*].

[3]While I realize academic wars are waged regarding how Law is defined jurisprudentially, I want to sidestep that controversy, and use "the Law" to connote the totality of expressions and justifications of the actors who are part of the legal system for their behaviour, doctrines and institutions. Pierre Bourdieu captures the Law's character well in his recently translated *Language and Symbolic Power* (Cambridge: Polity Press, 1991) in the following: "...that the most vigorously rationalized law is *never anything more than an act of social magic which works*" (emphasis added, at 42).

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

[5][1989] 2 S.C.R. 796; (1989) 61 D.L.R. (4th) 688.

[6]The *Inquiry Committee Report*.

[7]*Commissioners' Report: Findings and Recommendations*, vol. 1, Province of Nova Scotia, 1989 [hereinafter the *Royal Commission*], at 23.

subterfuge has lurked throughout the saga: judging is judging, a realm where reproof is both alien and illegal; when no law delimits judgment and discretion is both absolute and the Law.

I will not reconstruct the facts of the Marshall matter as they are easily accessible,[8] but will instead consider one narrow aspect – how the legal system responded to the suggestion that the Marshall Reference judges acted improperly in their comments that the innocent Marshall was responsible for his mistreatment, that he was a liar and a thief, and that if his case revealed any miscarriage of justice it was more apparent than real. It was outrage over these comments which lead the Attorney General of Nova Scotia to request that the Canadian Judicial Council appoint an Inquiry Committee to consider whether or not the judges should be removed from office and to "restore [public] faith and confidence in the highest court in this province."[9]

To step outside of the internal web of legal discourse and doctrinal entanglements so evident at these rare moments of self–reflection – a web that sets perimeters for the incredulity one should harbour toward a system that entraps the guilty and the innocent alike – we witness the pathetic response of a fallen legal system. It is a "fallen" system not just for its sins but for its failure to repent. After the Report of the Royal Commission,[10] the Canadian legal system lost the official innocence upon which it levitated. It was exposed as flawed even by its own, the judges turned Royal Commissioners, who detailed its failings. It was in this moment of imposed reflexive scrutiny on its conduct, of peer review and finally institutional retrenchment, that we witnessed the choice of the judicial actors to pursue the preservation of self–righteousness above all else.

In the aftermath of the Marshall affair, we are left asking: Can the Law ever look beyond itself? Can it ever grasp the inhumanity and tragedy of its errors? With the Marshall experience our most telling indicator, not likely. In the *Inquiry Committee Report* we see the Law recoiling from publicly perceived (and Royal Commission recorded) errors in the Marshall case with a vindication of itself: with a celebration of its judicial actors' immunity from accounting for why they said what they said in the Reference, obfuscating comments that unleashed

---

[8]For an excellent overview and critical analysis of the entire Marshall affair, see H.A. Kaiser, "Legitimation and Relative Autonomy: The Donald Marshall Jr., Case in Retrospect" (1990) 10 Windsor Y.B. Access Just. 171. For a more focused critical analysis of the Report of the Royal Commission, see M.E. Turpel "Further Travails of Canada's Human Rights Record: The Marshall Report" [1991] 3 International Journal of Canadian Studies 27.

[9]Letter reproduced in *Inquiry Committee Report*, *supra*, note 2, majority opinion, at 17.

[10]*Supra*, note 7.

unprovoked destruction in the life of an "accused" person.[11]

This sordid affair invites a literary comparison: Herman Melville's engaging story of justice perverted on a warship called the "Bellipotent," in *Billy Budd, Sailor (An Inside Story)*.[12] In *Billy Budd*, like Marshall, young Billy's innocence is subverted to the martial code by which he must be judged. As a result, Melville tells us:

> [i]n a legal view the apparent victim of the tragedy was he who had sought to victimize a man blameless... The essential right and wrong involved in the matter, the clear that might be, so much the worse for the responsibility for a legal sea commander, inasmuch as he was not authorized to deal with the matter on that primitive basis.[13]

In the case before us the final victim "in a legal view" is not, I would argue, any particular individual but the Law itself, that which has sought to "victimize a man blameless." By daring to question the Law, Donald Marshall, Jr., constructed it as the victim before himself "in a legal view." The focus shifted to an examination of the victimization of the perpetrator of the injustice in the Marshall affair and away from the real victim. The legal victim (the Law)[14] must respond to its victimization (the Report of the Royal Commission which exposed the Law's error) by vindicating itself. It does so, I will argue, by a convenient retreat into doctrinal rhetoric.

By constituting the Law as the apparent victim in the Marshall affair, an interesting reversal is effected – the innocent once again become the target of aspersions and the Law is saved from criticism by the open doctrinal texture of Law talk.[15] We see a retreat (or advance?) into the realm of doctrine with a

---

[11]It is hard to escape our prison house of legal language where an individual is constituted as an "accused person" rather than a person, like any person "inside" the system as opposed to (an)other - the outsider, the "accused" or "wrongfully convicted " or "a Mikmaq." It is neater conceptually and therefore emotionally to deal with the constructed "other" rather than a fully contextualized person, or rather, ourselves and our own lack of innocence as insiders to the Law. It is easier to reflect, in this case, on the supposed or ascribed crimes of the victim rather than the Law's crimes.

[12]H. Melville, *Billy Budd, Sailor, and Other Stories* (New York, Penguin Classics, 1985), at 317. I will not recount the story here. I leave it to those who are unfamiliar to read it, indeed I encourage you to do so. Upon doing so, I also invite you to extend the present analogy by speculating as to a character in the Marshall affair corresponding to Jemmy Legs in *Billy Budd*.

[13]*Ibid.* at 380.

[14]Here I am in agreement with Michael Crawford, *infra*, that the Judicial Council Inquiry Committee cannot be viewed as anything other than "the judiciary judging itself " (*supra*, note 2) as compared with any kind of genuine public review body.

[15]See, for example, the handy distance gained in Madam Justice McLachlin's opinion in *MacKeigan v. Hickman*, *supra*, note 5, by retracing the origin of the doctrine of judicial immunity to Knowles trial (1692), 12 How St. Jr. 1167.

homily on judicial immunity in the Supreme Court of Canada in *MacKeigan* v. *Hickman*, and then again in the *Inquiry Committee Report*. By focusing on the doctrine of immunity, accountability is skirted and judges are secure in a "comfy zone" above reproach. Judges can be criticized for what they write but never asked to explain why they wrote what they did.[16] Hence, any review of judicial error in reasons for judgement must take the form of an exercise in literary criticism where first–hand accounts of authorial intention are either unavailable or unnecessary to complete the text.

We know from theoretical work this century in literary theory that any text permits a wide range of readings, from the highly constructive and politically charitable to the deconstructive and politically eisogetic, especially when the reader approaches a seemingly definitive text (such as a recorded judgment) as being infinitely permeable, and in fact, just one set of co–ordinates on a larger map of discourse. This all makes it rather hard to maintain one's bearings. There is a way, however, to ensure stability in the work of review and interpretation and that is to control both the writing and the criticism – in other words, keep the mass in Latin. In this matter it is, for the most part, others cut from the same cloth, or judges who serve as official literary critics. In other words, here we find that the same class of authors are the critics – judges judging judgments. This is transparently a form of literary criticism which will permit only the most cautious and politically acceptable interpretations.

The majority view of the Inquiry Committee read the Reference decision as allowing disturbing impressions to be created to the public which, if they did not criticize them, would lead to impaired public confidence.[17] This is far from public scrutiny – it is an exercise in textual criticism of the Reference judges' obiter dicta which strives for an interpretation just critical enough to restore public confidence. This is all that can be mustered by the Law because to make judges publicly account for their reasons for judgment, in any circumstances, we learn from Madam Justice McLachlin in the Supreme Court of Canada "would be to strike at the most sacrosanct core of judicial independence."[18] The constraints

---

[16]Mr. Justice Cory, in *MacKeigan* v. *Hickman* suggests that judicial immunity may not be absolute in matters of court administration and finds that it may be lifted where "it is necessary to reaffirm public confidence in the administration of justice." (*supra* note 5 at 705). While some sense of context, albeit limited, creeps into his reasons, it was lost on the Supreme Court and the Inquiry Committee. In the *Inquiry Committee Report*, Chief Justice Allan MacEachern assures us that in our best of possible legal systems the lack of accountability for judicial utterances is fairly purchased by a corresponding principle restricting judicial commentary out-of-court (after-the-text).

[17]*Supra*, note 2 at 36.

[18]Two of the Marshall justices, MacKeigan C.J. and Pace J.A., averted the quest for vindication (one left the Bench due to ill-health, the other retired). The Inquiry Committee took the view that it has no jurisdiction over ex-justices so nothing was said about their conduct.

on interpretation are formidable – the priesthood must remain in tact.

The battleground of responsibility for error and its cruel consequences for the Marshall family then became one of respecting judicial immunity versus restoring public confidence. With these political commitments it is not surprising that no serious review of the Reference judges' comments on their responsibility for error was undertaken by the Inquiry Committee. Mindful of the preeminence of judicial immunity, the Inquiry Committee considers how much (or how little) of the Reference text should be critically questioned in order to satisfy so–called "public confidence" (read, "public complicity" or "public mystification") in the judiciary.

The authors/judges vigorously resist any moment of interpretation which would require them to suggest that to make them address their comments would create a situation wherein they are more sinned against than sinning: if they did err in the first place, as the Chair of the Inquiry Committee suspects they did not in his dissenting reasons, they certainly cannot be expected to publicly explain how or why. This would compromise them and more importantly, it would compromise the Law itself – the doctrine of judicial immunity would be violated.

The doctrine of judicial immunity is paramount to accepting responsibility for perceived errors or explaining why harsh and ill–informed words were used. Those are political matters which judges supposedly are above and by virtue of judicial immunity their role must be preserved even in the face of public criticism. Just as Captain Vere pronounces in the hasty trial of Billy Budd that "mindful of paramount obligations, I strive against scruple that may tend to enervate decision,"[19] the Law cannot enervate itself in dealing with the both real and apparent political and moral error in the Reference decision. The judges are only too aware of the fact that to pause to consider scruple or compel accountability would demystify the Law's social magic and their tragi–comic wizardly role. There can be no criticism of the Law beyond itself and hence no move outside of its discursive framework; only internal and controlled (by juries of their peers) doctrinal struggles can be whipped up when alleged errors arise.

The entire affair is revealing because, unlike the promise we tend to associate with literary criticism, the liberating play of meanings and the virtues of diverse readings of particular texts, the Law's words have a political finality. When the book ends, or perhaps in the opening chapter, the prison door is locked. Interpretation after the fact is only self–justificatory. It is not a free or liberating play of meanings: certain interpretations are privileged and these are backed up

[19] *Supra*, note 11 at 387.

with violence (the gun, the prison, the stigma). In such a highly politicized (and violent) discourse, one tenet mercifully required should be a willingness to accept and examine fallibility. Yet, we see in the Marshall saga no open acceptance of error, nor readings of the judgments sensitive to the need to cause the powerful to answer for their wrongful wielding of it. We have to ask ourselves after Marshall, how a (fallen) legal world deals with the innocence? In a complex way, we can see from the judges' behaviour at the Inquiry Committee that the Law seemed to face a choice: either tarnish the innocent (so they don't seem too innocent in contrast to those committing error), hence deflecting any anticipated criticism of itself, or ignore the innocence by retreating – leaving only the innocent to transact in a world of accountability, pleading their case tacitly by remaining dignified.

There may be societal justification for a very limited immunity of judges, but not absolute immunity, self–serving non–culpability. In a democracy, only the will of the people is absolute – not the Law or its judges. While technically judges can be censured or removed for gross misconduct, the basis for review of judges is so narrow and statutory provision so vague[20] that little serious review has ever been conducted as illustrated by the Marshall case. Reports are occasionally written criticizing judicial conduct, but it is difficult to characterize any of them as more than internal wrist–slapping.[21] There are no publicly established standards for judicial behaviour, and, as any lawyer knows, when you regulate your own profession an argument can be made to your friends (other judges) that almost any type of behaviour need not be justified publicly.

The marginalization of the outsider, Donald Marshall, Jr., in the Inquiry Committee review process was apparent from the outset. As the Inquiry commenced and once again serious aspersions were cast on his character, Mr. Marshall was without representation, without a voice. Marshall was forced to revisit the shame and damage caused in 1983 after the *Reference* decision allegations. Just as his early efforts to be compensated were shadowed by the dark cloud hanging over him after the *Reference* reasons, having been completely vindicated by the Royal Commission Report, once again his efforts to rebuild his life with honour and public recognition of his innocence was undermined at the Inquiry Committee hearing. Furthermore, the contention presented during the Judicial Inquiry Committee proceedings, that the singling out of the *Reference*

---

[20] *Judges Act*, R.S.C. 1985, c. J-1, s. 65.

[21] I do not doubt for a moment that the judges whose comments were criticized were highly offended by the conclusions of the Inquiry Committee majority report. The majority committee members would be seen as "traitors" of sorts in the world of judicial etiquette. However, this world is so narrow and incestuous that study of the internal repercussions hardly seems politically relevant.

judges could be seen as a greater miscarriage of justice than that experienced by Mr. Marshall is nothing short of obscenity. How can anyone compare the "ordeal" of public accountability to eleven years of unjust imprisonment and subsequent public humiliation?

The most revealing aspect of the Judicial Council Inquiry Committee's report on the Marshall Judges is Chief Justice MacEachern's separate opinion. As Chairperson of the Committee, this opinion carries some obvious weight. It also serves to undermine the exceedingly moderate criticism of the majority opinion. Chief Justice MacEachern's opinion is that of the apologist for the Law, the defender of its unfair victimization and the purveyor of a philosophy of unbridled judicial freedom. While the majority opinion can be characterized as striving for middle ground, aiming to re–establish public (blind?) faith in the judiciary while preserving notions of immunity, the Chairperson's opinion assumes the high ground, aiming to discredit those whose faith is faltering, while enshrining the priestly status of judges. He finds that the Royal Commission was wrong on most points in its criticism of the Marshall Reference judges. Indeed, in support of the judges' conduct, Chief Justice MacEachern offers that "there were legitimate reasons for the court to lay some of the responsibility for this misfortune on Mr. Marshall."[22]

Chief Justice MacEachern defends the judges' damaging language, elevating their right of expression to a guarded norm "...if judges are expected to speak openly, directly and bluntly about matters that may be of public importance, then we must be very careful indeed before we dilute that principle."[23] The Chair of the Committee does not report the general principle of judicial license in the particular context of the Marshall affair, nor does he offer evidence as to the "public importance" of the devastating comments in question. Instead, we are escorted to the realm of dogma where there is little room for the aberrant incidents of personal tragedy.

The message delivered to the public and Marshall himself in Chief Justice MacEachern's opinion is simple and not unlike Melville's characterization of the sailor's life in *Billy Budd*: "every sailor [citizen] too, is accustomed to obey orders without debating them; his life afloat is externally ruled for him."[24] This is the image Chief Justice MacEachern projects of the citizenry – the judges perform

---

[22]*Supra*, note 3 at 22.

[23]*Ibid.* at 25.

[24]*Supra*, note 11 at 364.

their elevated role (in the public service and as a matter of presumed public importance) and everyone else owes fealty to them because they are judges.

The arrogance of the notion of immunity and a doctrine of an unbridled judicial right to say openly what is deemed in the "public interest" – and to not speak the whole truth if so inclined – is compounded when we realize that in the Marshall case we are examining a miscarriage of justice of an aboriginal person. As an aboriginal person, the criminal justice appeal system is an alien one and the judiciary is seen as an offensive colonial symbol having only might as its source of authority. The presence of racism in the handling of the Marshall case was one of the Royal Commission's most disturbing findings. Yet, there is no sensitivity shown in the Inquiry Committee Report toward the need to develop some measure of Mikmaq or aboriginal confidence in the judicial system. Surely a final opportunity to begin healing the wounds inflicted through abuse of the Grand Chief's son has been missed. The Mikmaq dimension of the case was lost in the Law talk because Law talk is exclusionary colonial talk.[25]

In this regard, it seems ironic that the separate opinion is as much an act of self–judging by Chief Justice MacEachern as it is an apology (as in apologetics) for the Marshall judges. Chief Justice MacEachern must vigorously come to the defence of the Marshall Reference judges with charitable interpretations because of what he has authored himself – in other words, he must construct his own defence. Chief Justice MacEachern's obdurate decision in the recent Gitksan case[26] inflamed aboriginal people across the country by his suggestion that, among other things, aboriginal life was nasty, brutish and short and that the Gitksan did not exhibit sufficient civilization to exercise dominion over property. Unfortunately, the nasty, brutish and short pronouncement, coming from such a position of power, is a truth–producing falsehood: that is, its utterance contributes to its accuracy in characterizing the lives of aboriginal peoples. One wonders what important public service is performed by blunt, culturally insensitive judicial language (except the maintenance of a crumbling colonial legal regime).

All aboard the Bellipotent?

---

[25]The Canadian system does not in any way currently reflect aboriginal law; not in structure, process, substance, language, nor punishments.

[26]*Delgamuukw et al.* v. *British Columbia et al.* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).