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## The Hollow Hope: Can Courts Bring About Social Change?

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# Book Reviews

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*Aboriginal Peoples and Criminal Justice: A Special Report of the Law Reform Commission of Canada.* Ottawa: LRCC, 1991. ISBN 0-662-58641-7.

Canada's criminal justice system has been shaken out of its stolid complacency in recent years by demonstrated instances of unfair treatment of religious, ethnic and racial minorities, and in particular our Aboriginal peoples.<sup>1</sup> Faced with a hue and cry directed at the justice system, the federal Minister of Justice asked the Law Reform Commission of Canada to study "as a matter of special priority, the Criminal Code and related statutes and to examine the extent to which those laws ensure that Aboriginal persons and persons who are members of cultural or religious minorities have equal access to justice and are treated equitably and with respect."<sup>2</sup> The Law Reform Commission of Canada took the position that the plight of Aboriginal persons in relation to the criminal justice system was sufficiently unique that it justified individual treatment. The report being reviewed is thus half of the Commissions' response to the ministerial reference. A second report dealing with cultural and religious minorities is to be released shortly.

Working under considerable constraints of both time and resources, the Commission has nevertheless produced a report which is both bold and pragmatic. The report is bold in that it squarely recommends the desirability of developing Aboriginal justice systems in Canada. It is pragmatic in that it also recommends a series of changes to the Criminal Code and to practice and procedures in criminal justice which would greatly improve prospects for equal access, equitable treatment and

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1. In respect of the mistreatment of aboriginal peoples by the criminal justice system, see: Nova Scotia, Royal Commission on the Donald Marshall Junior Prosecution, (Chair: T. Alexander Hickman), (Halifax: The Commission, 1989); Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Chair: R.A. Cawsey), Edmonton, The Task Force, 1991; and Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Chair: A.C. Hamilton and C.M. Sinclair), (Winnipeg: Queen's Printer, 1991). Perhaps the most virulent criticism of the justice system from racial minorities has followed a number of instances where black youths have been shot by police in both Montreal and Toronto.

2. Law Reform Commission of Canada, Report No. 34, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (As requested by the Minister of Justice under Subsection 12(2) of the Law Reform Commission Act, Ottawa, 1991, p. 2.) Hereafter the *Report*. Note: This review was completed before the regrettable decision of the Government of Canada to abolish the Law Reform Commission of Canada.

respect for Aboriginal persons coming in contact with the criminal justice system. Each road-bed in this two track system which the Commission advises us to take deserves comment here. General comment will also be made on the viability of a voyage on either track.

The commission is not about to abandon its commitment to the traditions of criminal justice inherited from the common law as evolved under the Canadian constitution. It states quite correctly that “[t]he system that many Aboriginal people would replace or drastically alter is much admired all over the world, because it is generally characterized by humanity and a respect for human dignity.”<sup>3</sup> But the Commission recognizes that “... this has not been the experience of Aboriginal peoples with the system.”<sup>4</sup> The Commission respects Aboriginal aspirations in this area:

“Aboriginal peoples have consistently voiced their desire to establish systems of justice that incorporate their own values, customs, traditions and beliefs but that permit the adaptation of these features to the realities of the modern age. They have well-articulated and amply documented reasons for preferring their vision to the present criminal justice system—a system to which, they contend, they have never consented and that can never command their respect.”<sup>5</sup>

As a result of its commitment to this perspective, the Commission makes the following recommendation:

“Aboriginal communities identified by the legitimate representatives of Aboriginal peoples as being willing and capable should have the authority to establish Aboriginal justice systems. The federal and provincial governments should enter into negotiations to transfer that authority to those Aboriginal communities.”<sup>6</sup>

This is a bold proposal, but it is couched in careful language which recognizes the difficulties involved.

The Commission is cautious in its advocacy of “negotiated solutions” since it clearly understands the futility of attempting to impose a monolithic “Aboriginal justice system” on Aboriginal communities that have very different traditions, cultures, and resources and which have suffered in differing degrees from the effects of three and one-half centuries of “colonization” (a word which the Commission uses liberally). Nevertheless, the Commission articulates what it sees as the central values and aspirations which might distinguish Aboriginal criminal justice systems from the mainstream system:

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3. *Report*, p. 93.

4. *Ibid.*

5. *Ibid.*

6. *Report*, Recommendation 2, p. 16.

“... [A] formal (sic) Aboriginal justice system would evince appropriate respect for community Elders and leaders, give heed to the requirements of Aboriginal spirituality and pay homage to the relation of humankind to the land and to nature.

The Aboriginal vision of justice gives pre-eminence to the interests of the collectivity, its overall orientation being holistic and integrative. Thus, it is community-based, stressing mediation and conciliation while seeking an acknowledgement of responsibility from those who transgress the norms of their society. While working toward a reconciliation between the offender and victim, an Aboriginal justice system would pursue the larger objective of reintegrating the offender into the community as a whole.”<sup>7</sup>

The Commission admits that an Aboriginal justice system would of necessity be “pluralistic”, i.e., would differ from one Aboriginal community to another, and that one cannot predict in advance what it/they might look like. However, the Commission is confident, citing the “Canadian Forum on Canada’s Future”, that “the Canadian people have reached a better understanding of the Aboriginal reality” which “... is now supplemented by a willingness among Canadians to attempt to redress past injustices.”<sup>8</sup> Whether this view is justified has yet to be revealed!

The Commission, perhaps presumptuously, suggests that participants in the negotiations for Aboriginal justice systems might wish to explore the merits of a list of features which includes:

- (a) relying on customary law;
- (b) traditional dispute resolution procedures with dispositional alternatives stressing mediation, arbitration and reconciliation;
- (c) the involvement of Elders and Elder’s Councils;
- (d) the use of Peacemakers;
- (e) tribal courts having Aboriginal judges and Aboriginal personnel in other mainstream roles;
- (f) autonomous Aboriginal police forces with police commissions and other accountability mechanisms;
- (g) community based and controlled correctional facilities.<sup>9</sup>

However, the Commission points to models which use many of these mechanisms with considerable success.

While the Commission attempts to downplay the radical nature of its proposals by citing examples of Aboriginal communities where analogous

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7. *Report*, p. 6.

8. *Report*, p. 94.

9. *Report*, pp. 22-23.

experimental projects are now underway, it does recognize the potential difficulties which must be faced in implementation of such systems. Constitutional objections, concerns over the rights of individuals and procedural fairness, and concerns over jurisdictional issues are all identified by the Commission, but are characterized as difficulties which can be surmounted. Ultimately, the Commission accepts that Aboriginal justice systems might fall short of the idealized models advanced by their proponents. However, the Commission also accepts the legitimacy of the arguments from Aboriginal peoples which it summarizes as: "Give us the keys. Let us control the system. We can hardly do worse than you have."<sup>10</sup>

The Commission is willing to assist Aboriginal communities which wish to board the train on the Aboriginal track and construct the rails and road-bed as they go. But the Commission is apparently quite realistic about possible delays before the train leaves the station. Hence, the Commission proposes considerable change in the mainstream criminal justice system intended to recognize and redress problems encountered by Aboriginal communities and Aboriginal accuseds. In order to do this the Commission forthrightly demands that we abandon allegiance to simplistic notions of formal equality in the criminal justice system. In its words: "Justice can no longer be blind: Justice must open her eyes to the inequities in society and see to it that they are not mirrored in the criminal justice system."<sup>11</sup> The Commission puts this general proposition in the form of a recommendation:

"The criminal justice system must provide the same minimum level of service to all people and must treat Aboriginal persons equitably and with respect. To achieve these objectives, the cultural distinctiveness of Aboriginal peoples should be recognized, respected and, where appropriate, incorporated into the criminal justice system."<sup>12</sup>

The working out of this principle in the mainstream criminal justice system constitutes the main bulk of the Commission's report. The Commission makes these detailed proposals for reform to the present system in the knowledge that many Aboriginal people view the Canadian criminal justice as a lost cause, but in the pragmatic belief that much can be done to improve the present system, and must be done for at least two reasons: Firstly, comprehensive Aboriginal justice systems may not be just around the corner. Secondly, not all Aboriginal communities will necessarily choose to establish separate justice systems, and the mainstream

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10. *Report*, p. 7.

11. *Report*, p. 12.

12. *Report*, Recommendation 1, p. 12.

system will inevitably be required to continue to cope with (hopefully reduced) numbers of Aboriginal offenders.<sup>13</sup>

The Commission proposes a number of general improvements under the broad heading of “fostering understanding and building bridges.”<sup>14</sup> These include: increasing the number of Aboriginal persons in all parts in the criminal justice system; better cross-cultural training for police, judges, lawyers, probation officers and correctional officials; improved awareness of language barriers and translation services; permanent liaison mechanisms linking all levels of the justice system with Aboriginal communities; and, increased Aboriginal community involvement with the justice system. The Commission is aware these improvements will face social and cost barriers on the part of governments called upon to implement them, and may not always be received enthusiastically by certain Aboriginal communities which fear co-option by the present system rather than concentration of efforts on the creation of independent and locally controlled justice systems.

There are a large number of technical recommendations oriented to the reform of criminal procedure which often rely upon previous reports of the Commission, while proposing specific adaptations for implementation in Aboriginal communities or in relation to Aboriginal offenders.<sup>15</sup> Community-based policing or aboriginal police forces are advocated as general organizational options, while particular rules are proposed to reduce police “over-charging” and to improve use of appearance notices as opposed to arresting Aboriginal offenders.<sup>16</sup> Recommendations relating to the exercise of prosecutorial discretion would discourage unnecessary prosecutions, and increase pre-trial disclosure which problems pose particular difficulties in many Aboriginal communities.<sup>17</sup> Recommendations also deal with improved access by Aboriginal persons to defence counsel, and to possible special rules concerning the interrogation of Aboriginal suspects.<sup>18</sup> A number of recommendations are also directed toward courts: greater sensitivity to Aboriginal traditions in courtrooms in Aboriginal communities, greater use of Aboriginal Justices of the Peace, more recognition of the right of Aboriginal persons to swear oaths consistent with their own traditions of spirituality, and the

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13. *Report*, pp. 26-27.

14. Chapter 5 of the *Report* has this title.

15. These are found in an omnibus Chapter 6, entitled “Changing Roles and Reforming the Process”.

16. *Report*, pp. 44-48.

17. *Report*, pp. 49-52.

18. *Report*, pp. 52-55.

resolution of problems caused by court sittings in isolated Aboriginal communities.<sup>19</sup> Many of these recommendations relating to police, prosecutors, defence counsel and judges require no change in statutory law, but only a more sensitive exercise of discretionary authority. However, in some instances the Commission is inclined to the use of legislative solutions in order to ensure compliance with these changes.

The final group of recommendations relates to change to the critical institutions of bail, sentencing and corrections. Easier police bail, recognition of the special requirements of traditional Aboriginal pursuits, removal of criminal liability for failure to adhere to non-monetary conditions of conditional release, and a more flexible approach to sureties are all put forward by the Commission as means to reduce the excessive numbers of Aboriginal persons now unnecessarily detained in pre-trial custody.<sup>20</sup> On the sentencing front, the Commission recommends use of alternatives to imprisonment wherever possible, expansion of victim-offender reconciliation programmes, use of day fines and fine option programmes to reduce imprisonment for default of fine payment.<sup>21</sup> In regard to corrections and parole, the Commission advocates recognition of Aboriginal Elders and spiritual leaders on the same basis as prison chaplains, creation of more programmes in prisons designed specifically to respond to the needs of native offenders, measures to ensure Aboriginal offenders are able to take advantage of parole to the same degree as non-Aboriginal inmates, and the construction of local correctional facilities over which Aboriginal communities would have controlling authority.<sup>22</sup> In making these recommendations on bail, sentencing and corrections, the Commission goes directly to the critical pressure points which lead, in part, to the unnecessarily high proportion of Aboriginal offenders in Canada's prisons, and it proposes sensible solutions.

As part of its pragmatism, the Commission is worried about the prospects for implementation of its recommendations. It recognizes that many of the recommendations which it makes have been repeated by various conferences, task forces and commissions of inquiry for at least 15 years.<sup>23</sup> As it says, "... a major difficulty in solving Aboriginal justice problems lies not in finding the solutions, but in instituting them."<sup>24</sup> To counter arguments that its recommendations would be too costly, the

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19. *Report*, pp. 55-60.

20. *Report*, pp. 61-66.

21. *Report*, pp. 66-73.

22. *Report*, pp. 73-84.

23. *Report*, p. 85.

24. *Ibid.*

Commission advises a comprehensive cost feasibility study (à la Nielson Task Force) which would analyze the present allocation of all government resources to Aboriginal communities in order to see whether a fundamental re-deployment of funds and elimination of duplication can be achieved. Finally, aware of the further research and consultation which would be required for the implementation of its recommendations, the Commission suggests the creation of an Aboriginal Justice Institute, the purposes of which would include the conduct of empirical research, the development and evaluation of policy options and programmes within the justice system or as alternatives to it, and providing assistance to and liaison with Aboriginal communities in these efforts.<sup>25</sup>

The careful pragmatism of the Law Reform Commission in its “reformist” recommendations for improvement of the present criminal justice system are within the main stream of its current work on reform of criminal law and procedure. For the most part, its recommendations for improving the lot of Aboriginal offenders in the mainstream criminal justice system are non-controversial and capable of easy, low-cost implementation. While the blindfold of justice might be removed in order to allow her to see and act upon “the cultural distinctiveness of Aboriginal peoples”, the recommendations present no fundamental challenge to the traditional punitive/adjudicative paradigm which underlies our criminal law. However, the vision of Aboriginal justice systems potentially contemplated by the Commission would likely operate upon paradigms which are very different. This bold and possibly far reaching aspect of the Commission’s work, and the contrast with the bulk of its previous efforts, deserves further comment.

In the cultures derived from the Judeo-Christian tradition of Europe, the primary notions of criminal justice have developed in relation to a punitive/adjudicative paradigm. Individuals who knowingly transgress criminal proscriptions are responsible for their actions and *deserve* to be punished. The punishment imposed is intended to deter the perpetrator from committing further crimes, and to deter others who may be tempted to do so. The reform and rehabilitation of the offender may also be sought. Imprisonment will not only punish but serve to remove serious criminals from society, at least for a time. The punishment is imposed in the name of society as a whole (or at least in Canada’s case in the name of the Crown which is thought to represent symbolically the interests of society), and therefore the conduct of the prosecution is ultimately in the hands of society’s representative, the prosecutor, rather than in the hands of a victim. In fact, the community participation, even that of the victim, will

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25. *Report*, Recommendation 15, p. 89.



be reduced to playing the role of witness, except in the rare instances where there is a trial by jury. The process is one of adjudication of factual allegations in accordance with procedural protections intended to ensure protection of individual liberty and formal equality through precise procedural rights. The complexity of the process is such that it only operates at its best when conducted by professional jurists - prosecutors, defence counsel and judges.<sup>26</sup> While the Law Reform Commission of Canada has, in the past, made major recommendations which would mitigate the harshness of this punitive/adjudicative paradigm (diversion, community sanctions, victim impact statements<sup>27</sup>, etc.), the main thrust of the Commission's work has been to render an admittedly punitive and adjudicative system more fair, consistent and tolerable.<sup>28</sup> Important and laudable work, but hardly intended to make a bold break with tradition.

The Commission's acceptance of Aboriginal justice systems in accordance with the values and institutional elements described earlier constitutes an important new step for the Law Reform Commission of Canada. The Commission, as stated earlier, attempts at various junctures to play down the radical nature of its propositions. For example, the Report states:

"It is important not to over-state these differences. As a practical matter, not every community will want to establish its own justice system. Other systems would be roughly parallel to those existing now. Also, even in traditional Aboriginal models, differences may appear to be greater than they really are. The type of behaviour that our criminal justice system seeks to suppress is, by and large, also unwelcome in Aboriginal communities. The over-all goals of our justice system (deterrence and rehabilitation, for example) and of any system based on traditional Aboriginal models will be similar."<sup>29</sup>

While some over-all goals might be similar, an Aboriginal justice system which can be described as informal, holistic, integrative, and

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26. Some might argue that the "punitive" aspects of this paradigm are over-drawn here, given the commitment of so many people in our criminal justice system to the principles of reform and rehabilitation. However, from the offenders perspective any unwanted restriction of liberty imposed by the criminal justice system can be and usually is seen as punishment. This fundamental principle underlies much of the thrust of modern sentencing reform which objects to the unnecessary sentencing disparity that often results from individualization of sanctions in the name of reform or rehabilitation of the offender. See Bruce P. Archibald, "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System" (1989), 12 Dal. L.J. 377, pp. 385-403.

27. See Law Reform Commission of Canada, Report No. 2, *Guidelines Dispositions and Sentences in the Criminal Process*, Ottawa, 1976.

28. For examples of the Commission's work which fall within the description of tidying and humanizing the present system, see Report 31, *Recodifying Criminal Law - A Revised and Enlarged Edition of Report 30*, Ottawa, 1988; and Report 32, *Our Criminal Procedure*, Ottawa, 1988.

29. Report, p. 19.

community-based, stressing spirituality, mediation, conciliation and victim-offender reconciliation will inevitably be very different from the secular punitive-adjudicative and rights-based model of the mainstream justice system.

The Canadian constitutional position, unlike some other federations, has reinforced the idea that the criminal law and criminal procedure are matters for national standards, formal legal equality, and "sameness" of treatment for all Canadians. The Commission's "pluralistic" stance represents a sharp break with that constitutional and political perspective.<sup>30</sup> If the Commission is right in its assessment that the Canadian people are ready to see Canadian governments negotiate such systems with Canada's Aboriginal peoples, this may represent an extraordinary opportunity for progress in the development of the Canadian criminal justice system. For some time now, critics of the Canadian criminal justice system have advocated the modification of the punitive/adjudicative model of criminal justice, by the introduction of more integrative options based on greater community involvement, diversion, mediation, conciliation and victim-offender reconciliation.<sup>31</sup> The traditional punitive/adjudicative model is seen by such critics as divisive, costly and counter-productive, in many instances increasing recidivism and the incidence of crime rather than reducing these phenomena.<sup>32</sup> By proposing the possibility of Aboriginal justice systems, the Law Reform Commission of Canada has not only presented an alternative for Aboriginal peoples; it has also proposed a mechanism which can be viewed as a significant social experiment of potentially vast importance to criminal justice in Canada as a whole. The bold proposals for Aboriginal criminal justice recommended by the Law Reform Commission of Canada should be followed not only in the interests of Aboriginal peoples, but also if, carefully monitored, for the advantage they may present for all Canadians.

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30. For a brief description of the theoretical basis on which one might justify departure from formal equality in the criminal justice system see my "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System," *supra*, note 26, pp. 403-408.

31. For the Law Reform Commission's early views on this topic, see its Working Paper, No. 7, *Diversion*, Ottawa, 1975.

32. See for example, M. Wright and B. Galaway, eds. *Mediation and Criminal Justice*, (London: Sage, 1989); Gene Stephens, "Participatory Justice: The Politics of the Future" (1986), 3 *Justice Quarterly* 67; or C.B. Harrington and S. Engle Merry, "Ideological Production: The Making of Community Mediation" (1989), 22 *Law and Society Review* 709.

Gerald N. Rosenberg,<sup>1</sup> *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: The University of Chicago Press, 1991). ISBN 0-226-72702-5. 357 pp.

Coming as it does in the midst of all the palaver over political correctness within the American academic community, *The Hollow Hope* is, if nothing else, an opportune articulation of iconoclasm in the debate over civil rights and constitutional law in the United States.<sup>2</sup> Professor Rosenberg's questioning of the "cult of the court" provides a welcome expression of healthy skepticism towards an institution which conventional myth reveres beyond its due.

Though it is a study of the U.S. courts, and is clearly written for an American audience, Professor Rosenberg's study also provides a useful point of contemplation for Canadians as we stand at the tenth anniversary of our own constitutionally enshrined bill of rights. Reading the book, one cannot help but ask whether we, too, may have misplaced our faith in the Constitution and the Supreme Court as a remedy for all the evils in Canadian society.

As Professor Rosenberg writes in the Preface, *The Hollow Hope* "is a book about the role of the courts in producing major political and sociological change in the middle and late decades of the twentieth century".<sup>3</sup> He captures the essence of the temperament with which his inquiry is concerned by opening with the following exchange between Justice Robert Jackson of the Supreme Court of the United States and U.S. Attorney General J. Lee Rankin during the hearing of *Briggs v. Elliott*:

JUSTICE JACKSON: "I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress. Certainly it would be much stronger from your point of view if Congress did act, wouldn't it?"

MR. RANKIN: "That is true, but ... if the Court would delegate back to Congress from time to time the question of deciding what should be done about rights ... the parties [before the Court] would be deprived by that procedure from getting their constitutional rights because of the present membership or approach of Congress to that particular question."<sup>4</sup>

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1. Gerald N. Rosenberg, MA (Oxon.), JD (Michigan), PhD (Yale). Assistant Professor of Political Science and Lecturer in Law, University of Chicago. Hereafter cited as Rosenberg.

2. An articulation which one suspects could come from few places other than the University of Chicago!

3. Rosenberg, p. xi.

4. Rosenberg, p. 1.

While the Attorney General's response may have been refreshingly frank (and, to the ears of a Canadian lawyer, not a little startling!), Rosenberg points out that both the question and the answer presuppose that the courts *do* have the ability to effect societal change. It is this expression of mutual faith that he sets out to explore. He says that it raises at least three questions which are worthy of further investigation:

- To what extent, and under what conditions can the judicial process be used to produce political and social change?
- What are the constraints that operate on the courts in their work?
- What factors are important in determining whether the courts can play an effective role in societal change?

In his analysis, Rosenberg looks at five broad areas of the law in which conventional wisdom holds that Supreme Court opinions have been the precursors of dramatic change in the years since the Second World War: civil rights, women's rights (including the right to abortion), environmental law, legislative reapportionment and criminal law.

He begins his examination by describing the two competing visions of the judicial branch: the "constrained court" v. the "dynamic court". The latter, he writes, views the courts as a functional institution. It sees the American judiciary as the leader of "the world's most powerful court system, protecting minorities and defending liberty in the face of opposition from the democratically elected branches".<sup>5</sup>

Rosenberg asserts that the key to the dynamic court view is the belief that courts are free from electoral constraints (p. 22).<sup>6</sup> Insulated from the more base aspects of the political world, they are able to act in the face of public opposition, where elected officials might be fearful of political repercussions. This is most clearly the case, the theory goes, in cases of social reform, when entrenched interests would otherwise have sufficient political power to thwart legislative change.

Against this is juxtaposed the image of the courts, although not susceptible to direct political coercion, as being constrained by their institutional limitations. According to this view, since courts lack both budgetary and "physical" (i.e. policing) powers, they "can do little more than point out how actions have fallen short of constitutional or legislative requirements and hope that appropriate action is taken".<sup>7</sup> It was for this reason that in the *Federalist Papers*, Alexander Hamilton described the

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5. Rosenberg, p. 2.

6. While this may be true for the Supreme Court and the Federal Courts, it is worthwhile to note that in over 40 states, at least a portion of the superior bench is either elected or subject to recall.

7. Rosenberg, p. 3.

courts as the “least dangerous” branch of government. Accordingly, even if the courts do strike out in a bold and innovative direction, they rely upon the cooperation of the executive and legislative branches for enforcement. In writing about the repeated frustrations encountered by the courts during the school desegregation process, for instance, he stirringly describes the Federal southern judiciary as “fifty-eight lonely men.”<sup>8</sup>

The constrained court view also emphasizes that in the American context,<sup>9</sup> judges are not truly beyond the reach of politics since they are selected by the executive. Anyone in doubt of the truth of this statement this need only look at the pitiful charade that has surrounded the recent Supreme Court confirmation hearings for its verification.<sup>10</sup>

It is clear that of the two models, Rosenberg thinks that the constrained court view is the more accurate. In his estimation, there are three separate and powerful limitations operating against the ability of the courts to play a leading role in social evolution: the limited nature of constitutional rights (and thus, the inherent restrictions on the courts’ freedom of manoeuver), the lack of judicial independence and the judiciary’s lack of powers of implementation.

Rosenberg first tests his theory by asking whether a cause-and-effect relationship existed between the decision of the Supreme Court in *Brown v. Board of Education*<sup>11</sup> and the advances made by the civil rights movement in the 1950s and 1960s.

*Brown* has been the rallying cry for civil rights activists in the United States for over 35 years,<sup>12</sup> and on its face, it was the first in an impressive line of noble and proud decisions culminating in the eradication of segregation from all publicly funded facilities. Despite this, Rosenberg argues that in substantive terms, real progress was not made in the area of civil rights until the legislative and executive branches entered the field.

The statistics that Rosenberg provides to support his assertions are astounding. He notes, for example, that ten years after *Brown*, only 1.2%

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8. *Ibid.*, p. 91.

9. And, one hastens to add, in the context of Canada and most of the Commonwealth, too.

10. Though lest it be thought that this is a phenomenon of the Reagan/Bush Presidencies, one has only to look back to the Roosevelt “Court-packing” crisis of 1937 to see how long-standing the practice of direct attempts by the executive to influence the judiciary really is.

11. 347 U.S. 483 (1954) and 349 U.S. 294 (1955) (the latter being the judgement as to remedy).

12. And as an aside, while I could not prove this in any way, my own experiences in an American law school leave me with the distinct impression that *Brown* seems to be the case that is still most talked about by American law students, *Roe v. Wade* notwithstanding.

of black children in the South attended school with whites.<sup>13</sup> Excluding Texas and Tennessee, the two states with the lowest percentage of black school enrollment, the figure drops to less than one half of one per cent (.48%)! In contrast, he notes that in the first year after the passage of the 1964 *Civil Rights Act*, nearly as much desegregation was achieved as in all the preceding years since *Brown*. And as a testament to the depth of the intransigence of the pro-segregation forces, Rosenberg recalls that in 1979, i.e. *twenty five years after the decision*, Linda Brown, the original plaintiff, had to file a desegregation suit on behalf of her children against the very same school board.<sup>14</sup>

Rosenberg suggests that contrary to popular belief, the real effect of *Brown* was to so anger the pro-segregation forces that some civil rights legislation which might otherwise have passed died as a result.<sup>15</sup> He goes on to note that segregation legislation actually *increased* in the years after 1954.<sup>16</sup>

Rosenberg asserts that it was not until the passage of the *Civil Rights Act* of 1964 that the constraints limiting court effectiveness were overcome and the courts could “re-enter the field with vigour”.<sup>17</sup> And not surprisingly, he attributes the passage of the legislation to economic and resulting political dictates rather than litigation.<sup>18</sup> In Chapter 5, Rosenberg traces the evolution of this pressure, including the demands placed on the United States by the world community as a result of her position as the leader of the “free world”. He points to such things as the 1959 Annual Report of the U.S. Commission on Civil Rights which argued that voting discrimination “undermines the moral suasion of our national stand in international affairs”,<sup>19</sup> as well as a request to the freedom riders by Attorney General Robert Kennedy that they halt their journey so that it could allow President John F Kennedy to hold talks with European and Communist heads of state “without the vivid reminder of segregation”,<sup>20</sup> as evidence of the particular sensitivity of the Federal Government to the issue.

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13. Rosenberg, p. 52.

14. *Ibid.*, p. 40, n. 2.

15. *Ibid.*, p. 155.

16. *Ibid.*, pp. 78-82.

17. *Ibid.*, p. 75.

18. At pp. 160 - 162, Rosenberg looks at the shifts in electoral patterns and the consequent changes in electioneering. He notes with some amusement that in the 1956 campaign, the Republican Party tried to paint itself as the civil rights party by producing a pamphlet entitled “Abe and Ike - In Deed Alike”.

19. *Ibid.*, p. 164.

20. *Ibid.*, p. 165.

Rosenberg suggests that the change that occurred with the *Civil Rights Act* was in large measure a function of the fact that Title VI of the Act prohibited the payment of federal transfer funds to errant states.<sup>21</sup> Moreover, he notes that southern business leaders began to “perceive, dimly at first, that their racism and abdication of leadership were taking a heavy toll; they were losing to other cities the industry they might have had”.<sup>22</sup> Whatever the case, the results seem dramatic: by the 1972 school year, for example, 83% of Louisiana’s black students went to school with whites, as compared with only 1.1% in 1965. Similarly, in Jackson, Mississippi, where federal funding doubled between 1968 - 69 and 1969 - 70, in the same period the integrated school population jumped from 5.4% to 98.6%!

“Fine”, one wants to say, “the Court’s decision may have had little direct effect on the ending of segregation, but surely *Brown* played a role in paving the way for the civil rights legislation of the 1950s and 60s”. Rosenberg contends that an examination of the legislative record shows this not to have been the case. He argues that *Brown* and its sister decisions played very little part in the creation of congressional and executive support for civil rights. Quite to the contrary, he asserts that support amongst the power base for civil rights was based on the belief that unless Congress and the President did act, mass bloodshed would occur. He states that “avoidance of violence was the lynchpin of the Kennedy administration’s civil rights program.”<sup>23</sup>

Rosenberg sums up his observations about the Supreme Court’s role in the civil rights movement by concluding that “[t]he combination of all these factors - growing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, the increase in mass communication - created the pressure that led to civil rights. The Court reflected that pressure; it did not create it.”<sup>24</sup>

Rosenberg next turns his attention to the women’s movement and the development of pro-choice rights.<sup>25</sup> Court action alone, he believes, could not have overcome the deeply-embedded societal prejudice against the notion of gender equality. Rather, in Rosenberg’s opinion, progress by the women’s movement is largely attributable to the impetus provided by economic dictates which first crystallized during the Second World War

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21. *Ibid.*, p. 100.

22. *Ibid.*, p. 101.

23. *Ibid.*, p. 123.

24. *Ibid.*, p. 169.

25. *Ibid.*, pp. 173 - 265.

(and which, he notes, was prior to the Supreme Court entering the field) as well as the political activism of the women's movement. Reaching a conclusion similar to that concerning advances in civil rights, he writes: "... Court opinions were delivered into a political, economic, and social system in which powerful forces were pushing for change. Court decisions joined a current of social change and a tide of history; they did not create it".<sup>26</sup>

As has been mentioned, the book contains comparable examinations of the developments in the environmental movement, reapportionment and the criminal law. In each, Rosenberg arrives at more-or-less parallel observations that in the absence of broad-based political and/or economic support for change, the courts acting alone have been ineffectual in bringing about real social transformation.

Anyone familiar with Professor Patrick Monahan's work will already have heard this contention. In his 1987 book, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*,<sup>27</sup> for example, Monahan noted that one of the chief arguments against the entrenchment of rights and the consequent empowerment of the courts was that historically, whenever the rights of the disadvantaged in Canadian society have been advanced, it has been accomplished through the political process. "Social programs", he described the argument, "and the institutions of the welfare state, whatever their shortcomings, are the progeny of the triumph of politics over economics and the market."<sup>28</sup> These critics of the *Charter*, he noted, regarded the state as a source of social justice, rather than oppression and domination. Related to this is the corollary that whenever the political process has acted to improve the lot of the disadvantaged, it has done so *in spite* of the courts, not in concert with them.<sup>29</sup>

Possibly because in addition to his legal education, Professor Rosenberg was trained as a political scientist, *The Hollow Hope* is profusely illustrated with graphs and charts. Indeed (though this may be nothing more than a reflection of the fact that *I* was not similarly trained), at times I felt close to being overwhelmed by the statistics and references that he marshalls in support of his thesis. The book is unquestionably a treasure-trove for anyone carrying out research into the development of post-War American society.

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26. *Ibid.*, p. 265.

27. Toronto: Carswell, 1987.

28. *Ibid.*, p. 43.

29. It is significant to consider, for example, that the Canadian labour movement has not wholly embraced the Charter and its judicial treatment as a good thing for the working people of Canada.



Having said this, one feels a certain temptation to take Professor Rosenberg to task for restricting his enquiry to such large and deeply-rooted problems as racial prejudice and gender inequality. His conclusions might have been somewhat different had he looked at smaller, more discrete issues within the larger framework. I am thinking, for example, of the decision of our Supreme Court in *Murdoch v. Murdoch*.<sup>30</sup> Restricted as the case was to a legal issue, and though he was speaking in dissent, it is nonetheless arguable that Mr. Justice Laskin's (as he then was) reasons for urging that a woman's contribution of money and labour to her husband's property be legally recognized played a pivotal role in forcing provincial legislatures to act at a time when they might have preferred to do otherwise.<sup>31</sup>

In addition, one cannot help but feel that it is a shame that Professor Rosenberg did not put greater effort into making his work more accessible to the generalist. As it is, the book would be very tough slogging for anyone but the most dedicated reader. One does not want to be too critical of such a meticulous and thorough work of research scholarship, but the dryness of the text seems a bit sad when one considers that the subject matter is so topical that it could have made for a very good read.

The differences between Canadian and American society, and between the Canadian *Charter* and the U.S. *Bill of Rights*, are of course well-documented. Chief among these - at least in the context of Professor Rosenberg's thesis - is the greater premium that we in Canada place upon collective rights and peace, order and good government. The deference to authority that is supposed to be so much a part of our psyche undoubtedly strengthens the position of the courts in Canada compared with those south of the border.<sup>32</sup> Moreover, much of the euphoria that

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30. [1975] 1 S.C.R. 423.

31. The decision of the House of Lords concerning negligent misrepresentation in *Hedley, Byrne & Co v. Heller*, [1964] A.C. 465, also comes to mind. Insofar as alteration of business practices can be called "social change", there is no doubt that after their Lordships' admonition, the way that prudent businessmen and women conducted themselves changed dramatically.

32. Although after the results of our recent constitutional referendum, perhaps *this* bit of conventional wisdom also needs to be rethought.

accompanied the adoption of the *Charter*<sup>33</sup> has now been replaced by a certain amount of realism (or perhaps resignation).

Nevertheless, *The Hollow Hope* is a compelling study for the Canadian legal scholar. It is submitted that in this year of anniversary, it can help us focus on the limitations in our new constitutional arrangements - to borrow the words of Justice Harlan of the U.S. Supreme Court, to help us realize that despite our adoption of a statement of fundamental rights, the *Charter* cannot be the cure for all our social ills.<sup>34</sup>

Without meaning to denigrate the *Charter* and the values that it is meant to embody, it is perhaps worthwhile to reflect upon the fact that ultimately, Canadian society will be as good or bad as individual Canadians want it to be. The *Charter*'s role in society should not be overplayed. It may be a purposive document, but as Mr. Justice Dickson reminded us in *Hunter v. Southam*,<sup>35</sup> the *Charter* is intended to constrain, not mandate, government action.<sup>36</sup> We must remember that we are above

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33. I think that possibly the best expression of this euphoria came from Jean Chrétien. In a speech given at the University of British Columbia in 1985, he said:

Because we have a Charter of Rights and Freedoms in our Constitution, I feel very strongly that Canada is a better place to live than it was before. We shall never again be able to become complacent about the weak in our society. Usually it is the majority and those with strength who rule. They take care of the weak in our society if they so wish. ... But now this is also the role of the state through our courts, who must guarantee equality in our society - the equality of race, of religion, of sex, of language. These will become one of the measures by which the value of our society will be judged in the centuries to come. I think that we have decided that Canada has achieved that level of sophistication. We are all the players. With all of our aspirations, and despite our political differences, everyone made a great contribution to what is, in my judgement, a very good Constitution and a very good Charter of Rights. I would like to end with the words with the leader of the NDP, who said that Canada's Charter of Rights is the best Charter of Rights in the world.

(Quoted from *J. Weiler and R. Elliot, eds., Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986)).

34. In *Reynolds v. Sims*, 377 U.S. 533 (1964), Harlan J. stated (in dissent):

[T]hese decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle" and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process.

35. [1984] 2 S.C.R. 145.

36. *Ibid.*, at 155.

all a political democracy, and that the *Charter* was aimed at strengthening the democratic process, rather than replacing it. Though it is directed at the United States with its different constitutional tradition, *The Hollow Hope* provides a timely jar to that memory.

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