

Poor Canada

I was raised in French Canada in the Catholic faith. We were repeatedly told at school that, in one of her apparitions to the three shepherd children at Fatima, Portugal, the Blessed Virgin Mary would reportedly have said “Poor Canada”. Assuming the veracity of that we are still wondering what was meant by the statement, it is tempting to think that the way our penal military justice system has evolved so far and lately is what the prophecy is all about. Let me explain.

Canada is a democratic state in which values such as freedom of thought, freedom of expression, freedom of association, equal and fair justice, equality before and under the law and equal benefits of the law, to name just a few of these values, have prevailed. The enactment and constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* (the Charter) by the government of the Right Honorable Pierre E. Trudeau, the father of the actual Prime Minister of Canada, was meant to protect and cement the fundamental values of our democracy.

Of course, like the Canadian Constitution, the Charter, which is an integral part of it, is not a static document. Nor is its content as shown by the judicial interpretation of such by civilian tribunals. However, the way our system of penal military justice has evolved in recent years shakes, if not spears, the confidence one may have had or still has in either the direction our democracy takes or in our democracy itself.

Indeed, through legislation the penal military justice system acquired jurisdiction over all ordinary criminal law and other federal offences, save on murder, manslaughter and abduction of children when committed in Canada. It means that all crimes but these three are investigated by a military police with limited experience and expertise, prosecuted and defended by a non independent military service personnel and tried by either the chain of command or military judges who have finally obtained, though not fully, their judicial independence thanks to civilian courts pursuant to nearly 20 years of costly litigation.

Assessing the constitutionality of paragraph 130(1)(a) of the *National Defence Act* (the Act) giving this extended jurisdiction to the penal military justice system, the Supreme Court of Canada in *R. v. Moriarity*, 2015 SCC 55 concluded that enforcement of criminal law pertains to the discipline, morale and efficiency of the military.

While Chief Justice Lamer in *R. v. Généreux*, (1992) 1 S.C.R. 259 had defined the purpose of a separate military justice system as one which allows “the Armed Forces to deal with matters that pertain **directly** to the discipline, efficiency and morale of the military,” the Court now finds that the words “pertain directly” should not be understood as limiting the scope of the purpose to offences occurring in military circumstances: see paragraphs 43, 46, 51 and 52.

At paragraph 54 it accepts the view that criminal conduct by members of the military is at least rationally connected to maintaining the discipline, efficiency and morale of the armed forces: the behaviour of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base.

Thus, while the Court Martial Court had tried to this point to restrain the penal military jurisdiction to instances where the crimes or offences committed had a service connection with the military service, in other words a military nexus, the Supreme Court has now in fact adopted the US status test: soldiers are soldiers 24h/day, 7days/week, 365days/year and 366days/on a leap year wherever they are, whatever they do and whenever they do it.

At a time when a wind of change and reform is blowing around the world on military justice systems, including the systems of our allies, with a view to improving the fairness of what have now become antiquated and unfair systems, especially in peace time, it appears now that the Canadian penal military justice system is running against the tide to the detriment of both our entrenched values and the members of the military who, like police officers, are Canadian citizens in uniform. Yet members of the military are subjected to a treatment different from the one afforded to police officers whose role is the enforcement of criminal law for the better protection of the public.

I have already mentioned on this blog the consequences of this differential treatment for members of the military and I do not want to repeat myself except to reiterate that chief among them is the loss of a jury trial constitutionally afforded to all Canadian citizens but them.

The time has come for the Canadian Parliament to assume its legislative responsibilities with respect to penal military justice. The enforcement of criminal law at least for crimes committed in Canada in peacetime should be left to civilian authorities and tribunals who have better resources and greater expertise.

Thus, paragraph 130(1)(a) of the Act should be repealed. Doing this would serve at least a twofold purpose. First it would restore equality of treatment and fairness to members of the military. Second it would be respectful of the Canadian Constitution which confers upon the Provinces the administration of criminal justice within their respective territory.

To ensure that the military justice system would still be empowered to enforce discipline for the morale and the better efficiency of the military, section 66 of the Act (pleas in bar of trial) should be amended. A verdict of guilt or acquittal rendered by a civilian tribunal in criminal proceedings should not be a bar to disciplinary proceedings. The defences of *autrefois acquit* and *autrefois convict* should not be available to prevent the enforcement of discipline in the military just like they cannot bar disciplinary proceedings before disciplinary tribunals.

Finally Parliament should set up a Committee of independent experts to review the penal military justice system and the Act so as to foster discipline in the military in a manner that is respectful of the constitutional rights and freedoms guaranteed by the Charter, the fundamental principles of justice both developed at common law and under the Charter as well as the values cherished by Canadians.