

# Miscarriages of Justice and Exceptional Procedures in the 'War against Terrorism'

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Emmanuel-Pierre Guittet

## Abstract

The object of this paper is to question the logic of generalised suspicion in indictment and detention procedures in the context of the war on terrorism, in order to understand the legal oscillation between resistance and deference to intelligence data in the judgment of terrorist acts. To illustrate these various forms of judicial resistance/deference, we closely examine three cases of judicial abuse in the fight against terrorism, corresponding to three different chronological and socio-political moments: the 'Guildford Four' in Northern Ireland (1974), the judicial condemnation and constitutional ban of Batasuna, the Basque nationalist party in Spain (2002) and the Maher Arar case in Canada (2002). Behind the screen of an elastic conception of public security, the primacy of an intelligence-based rationale over the judicial process results in tensions between the attribution of guilt and the rendering of justice that distort classical judicial procedures and the principle of a fair trial. Moreover, such tensions eventually legitimise proactive and preventive strategies that lead to condemnation through allegations of terrorism rather than proof.

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This project assesses the relations between the European Union (EU) and Canada in the area of Justice and Home Affairs (JHA). It aims at facilitating a better understanding of the concepts, nature, implications and future prospects related to the Europeanization of JHA in the EU, as well as its role and dilemmas in the context of EU-Canada relations.

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# MISCARRIAGES OF JUSTICE AND EXCEPTIONAL PROCEDURES IN THE 'WAR AGAINST TERRORISM' *CEPS Special Report/September 2008*

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## Introduction

The attacks against the United States on 11 September 2001 have given new urgency to the call for political cooperation. With the fight against terrorism having been elevated to the highest priority and 'terrorism' presented as a threat to all democracies, the discourses of democratic solidarity against terrorism and of national insecurity have become very clear. Furthermore, they have emerged as common discourses to invoke a 'state of exception' and to suspend the rule of law, which may also include derogations of international commitments. It has been widely accepted among political actors that 'necessity' knows no law and that individual rights to liberty are trumped by the collective right to security.

The 'war against terrorism' is certainly not an American invention (O'Connor & Rumann, 2003; Guittet, 2004). Indeed, the excesses and failures of anti-terrorist policies were already a European concern prior to the 9/11 attacks, as was the ensuing common perception of a transatlantic rift in the debate on the 'necessary sacrifice' of liberties for the sake of national and international security. In the post-9/11 period, political actors have sought to justify reliance on emergency measures adopted under exceptional procedures in the fight against political violence (Tsoukala, 2004; Bigo & Tsoukala, 2008).

How then does the judiciary respond to the demand to exceed the law in the name of collective security? What are the consequences in terms of rendering justice and especially in relation to the miscarriage of justice?

Here we follow the main argument developed by Kent Roach and Gary Trotter: "[T]he temptation of departing from normal legal standards and engaging in pre-judgement, prejudice and stereotyping may be particularly high in emotive and devastating cases involving allegations of terrorism and fears of continued acts of terrorism" (Roach & Trotter, 2005, p. 968). In their paper, they tend to discuss and challenge the classical rights-based definition of miscarriages of justice as whenever individuals are treated by the state in breach of their rights; whenever individuals are treated adversely by the state to a disproportionate extent compared with the need to protect the rights of others; or, whenever the rights of others are not properly protected or vindicated by state action against wrongdoers. We agree with them when they argue that the concept of a miscarriage of justice should not be limited to wrongful convictions and should include all procedural shortcuts that allow for detention without a criminal trial (Roach & Trotter, 2005, p. 1036). Despite the profound quality of their argument, we do not hold that 'tunnel vision' – the blind determination of the police to get someone convicted at any cost – is the glue that brings together a number of failures in every judicial system facing political violence, i.e. terrorism.

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Our argument is that the recourse to intelligence practices and the deployment of a counterinsurgency methods coming from the military field to qualify terrorism always lead to significant miscarriages of justice or a lack of justice (Guittet, 2006). The glue that brings together a number of failures and wrongful convictions in the very judicial system facing terrorism is the political climate of exception, generalised suspicion and the oscillation of the judiciary between resistance and deference to the primacy of intelligence data when terrorist acts are judged. To illustrate these various forms of judicial resistance/deference to the logic of generalised suspicion, we closely examine three examples of judicial involvement in the fight against terrorism that correspond to three different chronological and socio-political moments:

- the ‘Guildford Four’, within the context of the multiplication of exceptional measures in Northern Ireland and the development of a climate of fear in Great Britain (1974);
- the judicial condemnation and constitutional ban of a Basque nationalist political party, Batasuna, in the name of the fight against terrorism (2002); and
- the case of the detention, deportation and torture in Syria of a Canadian citizen, Maher Arar, based on Royal Canadian Mounted Police (RCMP) information given to the US administration (2002).

Confronting these three cases calls for recognition of the differences in context and judicial systems. Nevertheless, they all highlight the importance of the anti-terrorist perspective with regard to the rendering of justice. These three cases show how some individuals have experienced the derogation of the democratic framework that defines the rule of law, as imposed by politicians in the name of exceptional situations of violence. These situations include i) the violent campaigns of the Provisional Irish Republican Army (PIRA) in Northern Ireland, ii) the spread of violent attacks by ETA and the development of a large left-wing nationalism in the Basque country, and iii) the international fear of al-Qaeda (accompanied by Canadian concerns to avoid disruption to its diplomatic relationship with the US administration). These three cases also underline how in different courts, the line between security intelligence data and probative evidence has become blurred to the advantage of so-called ‘national security imperatives’.

## 1. Judicial abuse or miscarriage of justice? Three cases

### 1.1 Guildford Four: Disproving the evidence

The Guildford Four case is now a classic example of miscarriage of justice in academic law courses. On 5 October 1974, timed bombs exploded in two pubs in Guildford that were frequented by off-duty British soldiers. The Irish Republican Army (IRA) took credit for the bombs that killed five persons and injured many more. The following year, four individuals – Gerry Conlon, Paddy Armstrong, Paul Hill and Carole Richardson – were arrested and jailed for life for the bombings. Becoming known as the Guildford Four, their story was given international prominence by the Oscar-nominated film *In the Name of the Father*, directed by Jim Sheridan (1993).

In the same case of the two bombings of Guildford’s pubs, Gerry Conlon’s father and the Maguire family (the ‘Maguire Seven’) were convicted of possessing nitro-glycerine, which was allegedly passed to the IRA to make bombs. In November 1974, two other bombs exploded in two pubs in Birmingham. Six Irish persons were immediately accused and were subsequently convicted. The Guildford Four and the Birmingham Six were charged with multiple counts of murder. The Maguire Seven were charged with possession of nitro-glycerine. The Guildford Four, the Maguire Seven and the Birmingham Six were all imprisoned for lengthy sentences on terrorist charges that were eventually shown to have been false (Kee, 1986; Mullin, 1997).

The legal authorities were determined to convict them despite the absence of any evidence apart from confessions obtained under duress. The judges at the trial and the first appeal gave the police the benefit of any doubt. The pressure of the police to obtain results and find those responsible for the bombings certainly contributed to the arrest and imprisonment of those who were not guilty of the crimes of which they were charged. The British media and almost everyone else accepted the guilt of the Irish people.

In 1989, the Guildford Four were released after 15 years in prison; in 1990, the Birmingham Six were released after 16 years. The Birmingham Six had undergone two unsuccessful appeals before they were officially acknowledged and recorded as victims of wrongful conviction/imprisonment following their success in a third appeal. The Guildford Four has also launched several appeals before they were accepted, officially, as victims of a miscarriage of justice.

## **1.2 Batasuna: The illegalisation of a party in the name of the fight against terrorism**

In 2002, Spain passed a law to render constitutionally illegal a political party that would fail to condemn terrorism. In the contemporary history of Western countries, there is no other example of such a political instrument. In the Northern Ireland conflict, British authorities never banned Sinn Fein, even if from time to time they were tempted to do so. But very pragmatically, British authorities always thought that one day the enemy could be a partner in a peace negotiation process.

After the 9/11 attacks, Prime Minister José Maria Aznar soon jumped on the bandwagon and took advantage of the new environment at the international and domestic levels (having an absolute majority) to carry out a hardening of the national anti-terrorist consensus. On 19 February 2002, the Aznar government suggested to the commission on the follow-up of the anti-terrorist pact a package of measures with the purpose of making the Partido Popular (PP)/Partido Socialista Obrero Español (PSOE) pact of December 2000 concrete. Among the six suggested measures, the government sought to re-evaluate the Law on Parties dating back to 1978 in order to gain the legal means for disposing of a political party in general and the Batasuna in particular.

Despite the protests of the Basque parliament and public demonstrations, the principle of the reform to the Law on Parties was adopted on 27 June 2002, which became the Organic Law 6/2002 on Political Parties (Ley Organica de Partidos Politicos). In the Spanish legal corpus, there were already a certain number of elements allowing the condemnation of apologists of terrorism. From this point of view, the Law on Political Parties did not bring anything new. That is to say, one has to consider it as it is – the outcome of an exceptional measure announced by the anti-terrorist pact of December 2000 to put an end to Basque radical nationalism, which was seen or presented as the ‘political front’ of the violent separatist organisation ETA. This is about a law that doubled the possibility – already inscribed in the Penal Code – of establishing criminal illegality (requiring proof of the use of violent means for terrorist activities) and ‘constitutional illegality’ in cases of a targeted party whose only ‘crime’ was not publicly condemning ETA as a terrorist group.

On 26 August 2002, the investigation judge of the Audiencia Nacional, Baltasar Garzon, ordered the suspension of the economic and political activities of Batasuna for three years, with the possibility for extension to five years, on the ground that the party was an important part of the ‘conglomeration’ of ETA. The procedure launched by Judge Garzon included not only the closure of all Batasuna offices and its Internet website, but also of other associations and no fewer than 70 nationalist taverns (Herriko Tavernas) on account that these were the primary

sources of finance and recruitment for ETA.<sup>1</sup> This ban was valid for the former names of Batasuna (Euskal Herritarrok, Herri Batasuna) and any other group from Batasuna. At the same time, the Spanish parliament requested the government to refer the case to the Supreme Court so that Batasuna could be deemed illegal. In parallel with these two actions, the public prosecutor submitted a request for the dissolution of this movement to the Supreme Court.

Spain's Supreme Court outlawed Batasuna, agreeing with the government's allegation that it formed an integral part of the violent separatist group ETA. The unanimous decision by 16 judges on the Court's Special Tribunal meant that the group – which typically won between 10 and 15% of the Basque vote<sup>2</sup> – was forced to cease all political activities immediately and was prevented from running in local elections. On 2 September 2002, Batasuna's activities were suspended. According to the decision by the Audiencia Nacional, any demonstration in favour of Batasuna, including the use of logos and posters of the fallen party or references to Batasuna, were prohibited. No fewer than a 1,000 elected representatives were suspended.

### 1.3 Maher Arar: Cooperation without accountability

The case of Maher Arar is that of a Canadian citizen who was deported from the US to Syria, where he was tortured as a terrorist suspect. The Maher Arar case is now well known in Canada owing to the fact that a special and independent commission has been established, i.e. the Arar Commission, under Dennis O'Connor, Associate Chief of Justice of Ontario.

The Maher Arar case involves deportation ('extraordinary rendition'), torture and issues of anti-terrorist cooperation between states without accountability. On 26 September 2002, Mr Arar was taken into custody by the US Immigration and Naturalization Service at Kennedy airport on his way home to Canada after visiting his wife's family in Tunisia. He was questioned about his alleged links to al-Qaeda for nine hours without a lawyer and then removed to the Metropolitan Detention Centre in New York. After 13 days, he 'disappeared' from US custody. It was later determined that he had been deported to Syria without a hearing and without the knowledge of the Canadian consulate, his lawyer or his family. On 21 October 2002, Mr Arar was handed over to Syrian authorities after being held briefly in Jordan for interrogation. He remained in custody, in an undisclosed location, for almost a year, without being charged and without being informed of the details of the case against him.

On 5 October 2003, on the eve of his trial before the State Security Court, Mr Arar was suddenly released to the Canadian consulate in Damascus by Syrian authorities. The next day he was flown home to Canada. On 5 February 2004, the Canadian government set up the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. The main conclusion of the Commission was that there was no evidence to indicate that Mr Arar had committed any offence or that his activities constituted a threat to the security of Canada. In October 2007, US Secretary of the State Condoleezza Rice acknowledged that the US had mishandled the case of Maher Arar, but he was to remain on the US TerrorWatch list.

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<sup>1</sup> The case commonly known as 18/98 is not really a single case or one set of criminal proceedings, but rather a whole host of legal proceedings made up of several cases and other pieces: Haika (Case 18/01), Gestoras Pro Amnistía (Case 33/01), Segi (Case 15/02), Batasuna (Case 35/02), Egunkaria (Case 44/04) and Udalbiltza (Case 6/03).

<sup>2</sup> Since its creation at the end of the 1970s, the party has received between 10 and 20% of the Basque vote.

## 2. Suspicion and exception in the fight against terrorism

In the three cases above, it is apparent how the background of exceptional circumstances generates the possibility that the use of undisclosed evidence will be preferable to an attempt to prove guilt beyond a reasonable doubt in a criminal trial. Exceptionalism leads to suspicious attitudes towards individuals and a belief that intelligence data are reasonable proofs even if inaccessible, especially among the courts, judges and lawyers.

In the case of the Guildford Four and that of the multiple of trials in the Basque country, the presumption that defendants are innocent in criminal trials until guilt has been proven beyond reasonable doubt by the prosecution against them was bypassed. At the centre of the Basque story is a condemnation without trial, which reveals the working of a perverse system in which pure political strategy, based on intelligence data, overtook judicial concerns. The justification is that these organisations were the creation of ETA or were sufficiently close to its objectives and members to be considered dangerous. The underlying thesis is that all those accused and the organisations, associations and political parties affected belonged to ETA. To put it differently, the case of the illegalisation of Batasuna and the trials against Basque associations are examples of how the use of circumstantial evidence by the Spanish courts led to a presumption of guilt by association. Furthermore, what is very interesting in the Spanish context is that all expressions of radical politics have been included in the broad category of those by ‘public enemy number one’ (Ubasart, 2008). Are radical political groups the natural allies of ETA simply because radicalism is also a constitutive element of ETA? The answer of the Spanish courts, following the political consensus in Spain is yes indeed. In the case of Maher Arar, it is not a matter of miscarriage of justice as much as one of a lack of justice based on erroneous information supplied by the RCMP in which, once again, the prosecution of terrorism blurs the distinction between intelligence data and probative evidence.

Exceptional measures dedicated to the fight against terrorism have contributed to a climate that has certainly caused more violence than enabled its reduction. In Northern Ireland, emergency powers to arrest, detain and interrogate suspects have been used against persons with no prior involvement in any kind of terrorist activities (Campbell & Connolly, 2003). It is now clear that in Northern Ireland, the great majority of persons detained under emergency powers have never been charged with any offence (O’Connor & Rumann, 2003). In the case of Batasuna and the condemnation of Basque associations, one can see how the elaboration of offences has authorised the punishment of those who did not intend to assist the clandestine organisation ETA, but who should have known they were assisting terrorists, to a certain extent. Moreover, in this context of exceptional procedures, general suspicion has been increased.

### 2.1 The power of suspicion and the reversal of judicial evidence

The Irish became a “suspect community” for most of the English (Hillyard, 1993): behind every Irish individual, there might be a potential terrorist. This principle of collective responsibility, whereby every Irish person is potentially guilty of being an IRA supporter is a classic counterinsurgency mindset in which every local is suspected of being in cahoots with the IRA and therefore guilty of hiding what s/he knows. In the Spanish situation, there are no differences regarding the logic of generalised suspicion; most of those involved in the enormous trials surrounding the condemnation of Batasuna were guilty by association, despite lack of access to the classified information. The case of Maher Arar is not so different if one examines why Arar was deported to Syria: his name, his origins and his travel destinations were considered suspicious.

The basis for a climate of suspicion is, on the one hand, the relation of a particular society to political violence and, on the other hand, the analysis provided by the political establishment and the images of enmity it creates that sometimes, if not often, fail to correspond to the perpetrators of the violence – above all when the latter remain clandestine. The climate of suspicion furthermore depends not only on the leading groups' interests in keeping or changing the images of enmity, but also on anxieties about the future and self-interest deriving from a logic that encourages hostility (Bigo & Guittet, 2004). Suspicion generates uncertainty over the nature of the enemy, which eventually has the potential to take on a virtual dimension, as it remains undefined.

The object of suspicion is less to fight this hidden enemy than to localise it and to fight the fear born of uncertainty. Suspicion cannot be dealt with as a crime already committed with subsequent calls for a police investigation, nor can it be compared with a military combat against a well-defined enemy: it is more a question of intelligence services, political management of public opinion and anticipation of a threatening future (Bigo, 2006). Yet, when suspicion is generalised, it erases the exceptional status of derogations and emergency measures, which become mere routine. But, without any defined object, space or time, there are no legitimate grounds for exception in a liberal regime (Bigo & Tsoukala, 2008). When suspicion becomes generalised, the violence it is supposed to fight also becomes generalised (Bigo & Bonelli, 2008).

## **2.2 The culture of secret: The effects of a counterinsurgency mindset on the judiciary**

It is clear that there is a certain judicial reluctance to invalidate government policy in the face of uncertain knowledge as to the level of risk involved, especially when the executive branch purports to have superior knowledge that remains secret and an atmosphere of national emergency exists. There is something of a longstanding tradition of judicial deference to the military, particularly in the American context owing to its constitutional structure and national history. This is the almost classical tension between presidentialism and a rather more court-centred constitutionalism, whereby the legal authority can undermine the state authorities' claim to legitimacy.

In her splendid monograph, Elspeth Guild stresses how the supranational human rights system is deployed by courts at the national level in ways that impede claims by state authorities to the legitimacy of their declarations of exception (Guild, 2007). "In reaching to a source of law beyond the State but binding the State, the national judge exercises his or her authority to adjudicate on the proportionality of the State authorities' efforts to escape some of their supranational human rights obligations" (Guild, 2007, p. 29). Of course, there are some differences between the EU and the US where, with the help of the media, the emergency has become the basis for granting exceptional powers to the executive branch. Still, when security threats are constructed as total war, the need for intelligence becomes a prevailing policy of counterinsurgency, all of which shifts military doctrine and institutional forms towards military dominance, executive privilege, the use of special forces and the unchecked power of intelligence agencies.

Behind the screen of an elastic conception of security (Jabri, 2006) and the primacy of an intelligence-based rationale over the judicial process, these tensions between guilt and the rendering of justice distort the classical judiciary procedures and the principle of a fair trial. Moreover, such tensions eventually legitimise proactive and preventive strategies that lead to condemnation through allegations of terrorism rather than proof. One should keep in mind that the risk of political violence in contemporary societies comes above all from highly structured clandestine groups with a strong political orientation, and among these groups only a few are



operational. And even in these cases, they usually only possess limited resources. Most of these groups try to keep a low profile and adopt a strategy of concealment rather than one of maximal prominence.

The strategy behind the 'war against terror' is less a logic of prevention than one of anticipating the worst, in which use of the practices of counterinsurgency is constantly advocated. Thinking in terms of counterinsurgency implies measuring and assessing the present with constant reference to the future and the potential risks. What matters is not what is going on but what might happen. If anticipation is the key word of risk assessment, the vulnerability of our societies constitutes the basis on which the future is always thought of as uncertain. This situation is captured in the maritime metaphor of governmentality proposed by Michel Foucault: one cannot steer a boat to a safe haven because such a place no longer exists – it is not even thinkable. This is precisely why any reflection based on risks is ultimately a form of colonisation of the future, which raises the following question: What are the consequences of a hypothetical extenuation of circumstances in relation to an attack that is condemned and yet not committed?

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