

Book Review
Compte rendu

Guantánamo North: Terrorism and the Administration of Justice in Canada

by Robert Diab
Halifax: Fernwood Publishing, 2008

Reviewed by Dave Steele*

*The sooner we get used to it, the better.*¹

The most reliable study conducted to date indicates that, from March of 2003 to July 2006, there were 654,964 excess deaths in Iraq as a result of the US invasion and occupation.² The intractable war in Afghanistan, raging since October 2001 has failed to bring any semblance of peace to Afghans.³ These are the results of the so-called “war on terror” initiated after the terrorist attacks within the United States on September 11, 2001. This war has had devastating consequences for the citizens of Iraq and Afghanistan. The consequences of the “war on terror” here in Canada are qualitatively different. Introduced into the House of Commons just over a month after September 11, the *Anti-Terrorism Act*⁴ signaled a dramatic shift in government policy relating to national security.⁵ Several authors, including Robert Diab in *Guantánamo North: Terrorism and the Administration of Justice in Canada*, have argued that this policy shift has had deleterious effects on the civil and political rights of Canadians.⁶ In light of the sheer

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¹ The words of Paul Gauthier, former head of the Security Intelligence Review Committee speaking in 2005, as quoted in Matthew Behrens, “Canada’s Secret-Trial Detentions: The Country’s ‘Intelligence’ Agencies Set the Agenda” in Teresa Healy, ed., *The Harper Record* (Ottawa: Canadian Centre for Policy Alternatives, 2008) 187 at 191; online: <www.policyalternatives.ca/reports/2008/09/reportsstudies1960/>. While not speaking specifically about Guantánamo North, Gauthier was bemoaning what he believed was excessive government oversight and an unwillingness on the part of Canadians generally to “stomach” what he felt the Canadian Security Intelligence Service (CSIS) needed to do to protect Canada’s national security post 9/11.

² Gilbert Burnham, “Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey” (2006) 368 *Lancet* 1421.

³ See generally James Laxer, *Mission of Folly: Canada and Afghanistan* (Toronto: Between the Lines, 2008).

⁴ S.C. 2001, c. 41.

⁵ Robert Diab, *Guantánamo North: Terrorism and the Administration of Justice in Canada* (Halifax: Fernwood Publishing, 2008) at 26.

⁶ *Ibid.*

magnitude of death and destruction in Iraq and Afghanistan, it may seem like trite liberalism, and even selfishly myopic, to focus on these recent degradations of civil and political rights here in Canada. Ideally, an author dealing with this topic should attempt to elucidate the connections between the changing climate of the justice system at home with the “war on terror” generally.

Diab’s argument pivots around the idea that there is a disconnect between the traditional conceptual framework of the Canadian justice system and the post-9/11 practice of administering justice.⁷ In an attempt to understand this disconnect, he borrows a theoretical framework originally developed by Ngaire Naffine⁸ and further developed by Elizabeth Comack and Gillian Balfour.⁹ The theory critiques what is referred to as “the official version of law,” which is, in the words of Naffine, “what the legal world would have us believe about itself.”¹⁰ This is best summarized as the ideological component of law – the idea that the law is impartial, neutral and objective, including the related idea of juridical equals, or that everyone is equal before the law.¹¹ Diab attempts to explain the growing chasm between the ideological pronouncements embedded in “the official version of law” (also known as the rule of law) and the actual concrete changes that have occurred post-9/11. His analysis focuses on how the social and political discourse was infused with the idea that extraordinary measures were needed to effectively deal with terrorism.¹²

Diab uses a variety of sources to establish the *Zeitgeist* of the period immediately following 9/11 as well as the current period. Diab correctly notes that in the immediate aftermath of 9/11, government action was framed primarily in terms of balancing rights with security. Then Canadian Minister of Justice Anne McLellan summarized this dichotomy quite succinctly, noting that “all Canadians are committed to increasing public security while maintaining our core values.”¹³ Presumably our “core values” included *Charter* rights, the very ones that many in the legal community had complained were being trampled

⁷ *Ibid.* at 14-16.

⁸ Ngaire Naffine, *Law & the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990).

⁹ Elizabeth Comack and Gillian Balfour, *The Power to Criminalize: Violence, Inequality and the Law* (Halifax: Fernwood Publishing, 2004).

¹⁰ The “official version of law” is virtually indistinguishable from the rule of law; indeed, Comack and Balfour seem to use the terms interchangeably. See also Naffine, *supra* note 8 at 24.

¹¹ *Ibid.*

¹² Diab, *supra* note 4 at 19.

¹³ *Ibid.* at 27.

in the *Anti-Terrorism Act*.¹⁴ Using a variety of disparate sources, Diab presents a convincing argument that it was exactly this paradigm, the rights versus security mode of thinking, which infected the administration of justice. The role of the justice system was increasingly portrayed as one of “balancing” the national security interests of the state against the civil and political rights of its citizens. This balancing figured prominently in a number of cases, including *Re Vancouver Sun*,¹⁵ in which the *Vancouver Sun* challenged the questioning of an uncooperative witness *in camera* without the knowledge or presence of defence counsel.¹⁶ Iacobucci and Arbour JJ. warned that “courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm.”¹⁷ This is an interesting acknowledgement that the justice system itself is susceptible to changing attitudes about balancing national security interests with civil and political rights.

Diab’s argument shines when the author examines exactly *how* a paradigm shift can affect the administration of justice. Before the *Anti-Terrorism Act* was even passed, Kent Roach warned that the very scenario Diab describes would come to pass, noting that the way in which the Act defers to judicial discretion was a roundabout way of “Charter-proofing” the Act.¹⁸ The judiciary would be in the position of balancing *Charter* rights against national security, which the Supreme Court of Canada had already ruled is an extremely important objective.¹⁹ Government arguments about wiretapping, preventative arrests, limiting oversight of the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS), and the increased need for secrecy seem to hold much more sway in the judicial system today than they did prior to 9/11. Diab discusses the earlier case of *Suresh v. Canada (Minister of Citizenship and Immigration)*²⁰ and the more recent

¹⁴ The Security of Freedom conference held in Toronto in early November of 2001, a full month prior to the passing of the *Anti-Terrorism Act*, resulted in a book which included several scathing indictments of the Act; see Kent Roach, *et al.*, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

¹⁵ [2004] 2 S.C.R. 332 [*Vancouver Sun*].

¹⁶ The author discusses a number of cases to substantiate his argument, only a sampling of which are referenced here. Interestingly, the author does not focus, as the title of the book would suggest, on the secret trial being held at the Kingston Immigration Holding Centre (aka Guantánamo North); see Diab, *supra* note 4 at 65.

¹⁷ *Vancouver Sun*, *supra* note 15 at 351-52.

¹⁸ Kent Roach, “The Dangers of a Charter-Proof and Crime-Based Response to Terrorism” in Roach *et al.*, *supra* note 14 at 131.

¹⁹ *Ibid.* at 133.

²⁰ 2002 SCC 1, [2002] 1 S.C.R. 3 [*Suresh*].

case of *Charkaoui v. Canada (Citizenship and Immigration)*,²¹ both from the Supreme Court, to illustrate what he refers to as “new perspectives on what is reasonable.”²² The case of *Suresh* is supportive of Diab’s central argument, as it signaled a noticeable shift from both the Supreme Court’s previous approach to human rights and international law. The Court ruled that, when being weighed against the Canadian government’s national security interests, even the possibility of facing torture was not absolutely protected in Canadian law and “might be justified.”²³ In a marked departure from both international law and the Court’s earlier jurisprudence on human rights, the Court effectively said that deportation to torture might be consistent with the *Charter*, and with the “principles of fundamental justice” in particular.²⁴ This shift has been fueled, Diab notes, by an increased deference to government arguments about national security.

In conclusion, the author offers several policy alternatives and critiques, some of which are more persuasive than others. For instance, the author’s critique of the *Anti-Terrorism Act* and its foundational assumption of a difference between the “normal” criminal, one to whom all *Charter* protections will apply, and an altogether new class of persons to whom *Charter* rights *may or may not* be afforded, is particularly strong.²⁵ The accused terrorist, the immigrant subject to indefinite detention, and the Canadian citizens subject to extraordinary rendition become new classes of people in our society who lack “the right to have rights.”²⁶ Surely the existence of this subset who are sometimes citizens and sometimes not, who are almost always from a racialized community, has a tremendous ideological impact on society. Diab’s argument would have been further strengthened by focusing on or taking into account the ways in which this ideology has fueled an increase in racism against Muslims and Arabs in particular, and whether this increase in anti-Arab and anti-Muslim sentiment facilitated the increasing levels of deference courts are willing to show to government interests.²⁷

²¹ 2007 SCC 9, [2007] 1 S.C.R. 350.

²² Diab, *supra* note 4 at 78.

²³ *Suresh*, *supra* note 20 at 78.

²⁴ Diab, *supra* note 4 at 59.

²⁵ *Ibid.* at 111.

²⁶ Hannah Arendt, as quoted in Sherene H. Razack, *Casting Out: The Eviction of Muslims from Western Law & Politics* (Toronto: University of Toronto Press, 2008) at 7.

²⁷ Evidence of this phenomenon is not in short supply. For a Canadian perspective, see Razack, *ibid.* For an American perspective, see Robert Rapley, *Witch Hunts: From Salem to Guantánamo Bay* (Montreal: McGill-Queen’s University Press, 2007).

Throughout the book, Diab refers to the rule of law in terms of the growing disconnect between practice and principle in the administration of justice.²⁸ The author is successful in establishing that there has indeed been a shift in how justice is administered post 9/11, but he seems to idealize the pre-9/11 justice system. This particular subject matter would have benefitted greatly from a systemic critique of both the ideology of the rule of law and of liberal democracy – as if the two could be separated. The full restoration of the rule of law coupled with repealing the *Anti-Terrorism Act* may still leave racialized communities at risk. While the rule of law may offer *formal* equality before the law, the unequal representation and lack of opportunities to exercise rights that members of racialized, immigrant and poor communities commonly experience would still be problematic.²⁹ It would also have been interesting to analyze how liberal democracies deal with emergency situations, and what sort of policy alternatives, if any, would have been possible post-9/11.³⁰

Despite these shortcomings, Diab achieves what he set out to accomplish in writing this book. He brings into focus an unsettling shift in the justice system, a shift that includes increased judicial deference to the government, that has elevated the importance of national security to the point that it may now trump even some of the most basic human rights provided for in the *Charter*.

²⁸ The author seems to posit that the repealing of the *Anti-Terrorism Act* alone will begin a slow process back to normalcy; see Diab, *supra* note 4 at 14.

²⁹ It may not be a fair criticism of the book to say that it did not offer an in-depth critique of the ideology of the rule of law. As the author constructs the entire book around this idealized notion of the rule of law, however, using it to contrast the recent shift in the administration of justice, the absence of any sort of critique seems like a rather large omission. For an example of such a critique, see Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1982) at 139-41.

³⁰ Carl Schmitt, legal and political theorist of Weimar Germany, reasoned that liberal democracies were inherently incapable of dealing effectively with extraordinary emergencies while at the same time maintaining their adherence to the rule of law. Schmitt, controversial for his involvement with the Third Reich, argued that an effective response to an emergency must not be limited by the rule of law. This idea has particular significance today with the continued push for less government oversight by Canada's national security agencies and the seemingly permanent state of emergency and war; see David Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Roach *et al.*, *supra* note 14 at 21.