

8. Constructing non-citizens: the living law of anti-terrorism in Canada

Reem Bahdi

Inter arma silent leges – In time of war laws are silent.
Cicero¹

INTRODUCTION

Contrary to Cicero's famous edict, Canadian law does not fall altogether silent in times of war. Rather, it serves as the site through which Canada expresses its commitment to the global war effort, showing its willingness to suspend the rights of citizens and non-citizens alike in the name of national and international security. After the bombing of Pearl Harbor, for example, Canada legislated for the internment of individuals with Japanese ancestry, confiscated their property, stripped them of citizenship and deported them to Japan, even if they did not have concrete ties to that country. Canadian history has demonstrated that one cannot understand the demarcation between those who are imagined to belong to the community and those who are constructed as 'foreigners' simply on the basis of citizenship. Rather, the demarcation has also historically been constructed along racial lines. In times of war the law speaks loudly and clearly against those who are regarded as undesirable, untrustworthy and foreign.

Since 11 September 2001, the trope of war has once again been invoked to justify the revocation of rights to certain segments of Canadian society. As a result of the 'war against terrorism', as it is popularly called, Arabs and Muslims in Canada have been disenfranchised and regarded as the foreigner within. The overtly racist instruments of the past have been put away. Arabs and Muslims are not being rounded up in internment camps nor are they being collectively stripped of their citizenship and required to leave Canada. Nonetheless, the war against terrorism has effectively constructed Arabs and Muslims in Canada as non-citizens because this war denies Arabs and Muslims rights that are otherwise guaranteed to other citizens.

HEIGHTENED DISENFRANCHISEMENT AND A TALE OF TWO CITIZENS

Conceptually, citizenship sits at the intersection of national and international law. It defines the rights and responsibilities of individuals *qua* individuals in relation to a particular political entity (usually a state). Citizenship also defines the rights and duties between states and individuals. The basic idea is that citizenship ties the individual to a state and articulates a belonging to a community which carries with it both rights and responsibilities. This special bond between citizen and state is reflected within Canadian domestic law in the oath of citizenship set out in the *Citizenship Act 1985* which requires individuals to affirm allegiance to her Majesty and to faithfully observe the laws of Canada. The International Court of Justice has also recognized the unique juridical bonds that exist between state and citizen:

According to the practice of States, nationality constitutes the juridical expression of the fact that an individual is more closely connected with the population of a particular State. Conferred by a State, it only entitles that State to exercise protection if it constitutes a translation into juridical terms of the individual's connection with that State.²

Citizenship thus denotes a special relationship between a citizen and a state. Accordingly, it carries with it certain rights granted only to citizens. In most if not all countries in the world, citizens have a larger bundle of legal rights than do non-citizens. The specific bundle of rights is country-dependent. In Canada, some of the rights of citizenship are codified while others are the creatures of the common law and still others operate at the international level. Citizenship at minimum entails certain mobility and due process rights that are denied to non-citizens. Citizenship is also supposed to keep one safe from acts of torture, at least at the hands of Canadian officials.

Canada's war against terrorism has weakened the bond of citizenship for the Arab and Muslim communities in Canada. Individual and community allegiances have been called into question in both official and popular contexts. As a corollary, the rights and protections that citizens claim from Canada by virtue of their belonging to the Canadian state have been diluted for the Arab and Muslim communities whose members can no longer take these rights and protections for granted.

Canada responded quickly to the 11 September attacks in the United States with a series of complicated legislative moves. The new laws added a number of new features to the Canadian legal landscape including preventative arrest provisions, trials based on secret evidence, enhanced

information-sharing protocols with foreign jurisdictions, and laws aimed at cutting off terrorist financing (*Anti-terrorism Act 2001*).³ Critics of the laws denounced these measures as unnecessary and warned that they would undermine fundamental civil liberties.⁴ However, the Canadian Government defended the anti-terrorism measures, contending that the new laws balanced individual rights with collective security and claimed that safeguards were in place to ensure that the laws would not lead to undesirable results.

Senator Joyce Fairbairn summarized the government position when she proclaimed in the Senate that:

In summary, the government believes that the powers granted under this bill are the right ones for a tough job and that they can be exercised with standards of fairness and justice which Canadians expect.⁵

Unfortunately, the Arab and Muslim experience in Canada is markedly different from what was anticipated by those who supported Canada's anti-terrorism laws. Arabs and Muslims in Canada have been constructed as non-citizens through the combined impact of various pieces of legislation, policies and operational decision, which are carried out against a backdrop of generalized fear and lack of understanding of the Arab and Muslim communities. This social context has contributed to hasty and ill-informed decision-making by Canadian officials who interpret and implement the anti-terrorism laws. These decisions in turn have heightened the sense of disenfranchisement experienced by the Arab and Muslim communities and traumatized some of its members.

While the popular stereotype of Arab and Muslim as terrorist predated 11 September this terrorist event helped fuel the conviction that Arabs and Muslims threatened the internal order of things and thus constituted the foreigner within, regardless of their citizenship status.⁶ 'The subtext is that Muslims are a foreign element, aliens ... with no tenure to citizenship, that they are here as sleeper terrorists....'⁷

Almost immediately following 11 September anti-Arab and anti-Muslim sentiment rose in Canada, likely fuelled by speculation that Canada represented a weak link in the North American 'security perimeter'.⁸ Increases in public suspicion of Arabs and Muslim in Canada were also undoubtedly spurred by the rising anti-Arab animus in the United States. Louisiana Congressman John Cooksey perhaps best expressed Arab- and Muslim-phobia in the United States when he made the following remarks in a state-wide radio address:

The terrorist had a different look, a different face If I see someone (who) comes in that's got a diaper on his head and a fan belt wrapped around the diaper on his head, that guy needs to be pulled over.⁹

Numerous community and civil rights organizations have detailed the generalized fear of Arabs and Muslims which exists in Canada along with the parallel feelings of disenfranchisement experienced by these communities beyond the immediate aftermath of September 11.¹⁰

The legal disenfranchisement of the Arab and Muslim communities in Canada is perhaps best conveyed through the stories of Maher Arar and Liban Hussein, two Canadian citizens who, until relatively recently, shared little aside from the decision to take up residence in Ottawa, Canada's capital, and their allegiance to the Muslim faith.

Following 11 September however, Arar and Hussein found their lives following a similar trajectory. Almost immediately after 11 September both men came under suspicion by US officials for allegedly having connections to global terrorism and both men have suffered, in varying degrees and different ways, as a result. Their stories reveal the extent to which the Canadian Government has, through its legal commitments to the war against terrorism, abdicated its responsibility to protect the rights of Canadian citizens, at least where those citizens are Arabs or Muslims. In Canada, citizenship is not the only signifier which demarcates exclusion or belonging to the state; race and religion also operate as categories of exclusion.

A significant amount of public information is available about Maher Arar's story because Arar himself has recounted his trauma on several occasions in the quest to clear his name. Moreover, following intense pressure from Canadian human rights advocates and a growing number of citizens, the government of Canada, on 28 January 2004, announced a Commission of Inquiry into the actions of Canadian officials in relation to Maher Arar and appointed Justice Dennis O'Connor as Commissioner. Justice O'Connor released the first part of his report in September 2006, and the second part in December, shortly before this chapter went to press. The factual findings made by Justice O'Connor largely support the conclusions drawn here and have been incorporated into the analysis. Somewhat less is known about the experiences of Liban Hussein, in part because Hussein has largely shunned the public spotlight, preferring instead to try to protect his privacy and go on with his life as best as he can. In addition, while Hussein has reached an out of court settlement with the federal government in response to the Government's falsely connecting him to terrorism, the terms of settlement remain confidential. Yet, Hussein did attract media attention in Canada and abroad. Sufficient information can be gleaned from press clippings to represent his experiences, at least in broad outline.

Maher Arar

Syrian-born Maher Arar came to Canada in 1991 at the age of 17 and eventually acquired Canadian citizenship. In September 2002, Arar, his

spouse, Monia Mazigh, and their two children were vacationing in Tunisia when Arar arranged to return to Canada on his own. On 26 September while in transit in New York's John F. Kennedy Airport, Maher Arar was detained by United States (US) officials and interrogated about alleged links to terrorism, including connections to Al Qaeda. During this detention, US officials focused on Arar's connections to Abdullah Al Malki, another Canadian citizen who also traced his family roots to Syria. Al Malki had been under surveillance by Canadian security officials following the 11 September attacks. US officials produced a lease agreement to an apartment that Arar had rented. The agreement had been co-signed by Abdullah Al Malki. According to Arar, he realized that Canadian officials were somehow involved in his detention in the United States when he saw this lease because it could only have come from Canada.

Arar indicated to US authorities that he had nothing to hide. He responded to all the questions put to him. For example, he explained that he knew Abdullah Al Malki only casually but had closer connections with Abdullah's brother, Nazih. Arar had asked Nazih to sign the lease agreement but he was busy and sent it to Abdullah instead.

In the course of being questioned about his connections to the Al Malki family, Arar asked to speak to a lawyer but his requests were denied. Eventually, he was shackled with chains at his wrists and ankles and taken to a cell. Twelve days later, again chained and shackled, Arar was flown to Jordan aboard a private plane. He later surfaced in a Syrian prison. Arar has given a vivid account of his time in Syria, where he spent most of his time held in a tiny 'grave-like' cell:

We went into the basement, and they opened a door, and I looked in. I could not believe what I saw. I asked how long I would be kept in this place. He did not answer, but put me in and closed the door. It was like a grave. It had no light. It was three feet wide. It was six feet deep.

It was seven feet high. It had a metal door, with a small opening in the door, which did not let in light because there was a piece of metal on the outside for sliding things into the cell.

There was a small opening in the ceiling, about one foot by two feet with iron bars. Over that was another ceiling, so only a little light came through this. There were cats and rats up there, and from time to time the cats peed through the opening into the cell. There were two blankets, two dishes and two bottles. One bottle was for water and the other one was used for urinating during the night. Nothing else. No light.

I spent 10 months and 10 days inside that grave.¹¹

Eventually, the Syrians moved Arar to a better cell in a different prison. He spent 374 days in a Syrian cell before being released. During that period,

he was beaten, tortured and forced to make a false confession about connections to terrorism:

The tire is used to restrain prisoners while they torture them with beating on the sole of their feet. I guess I was lucky, because they put me in the tire, but only as a threat. I was not beaten while in tire. They used the cable on the second and third day, and after that mostly beat me with their hands, hitting me in the stomach and on the back of my neck, and slapping me on the face. Where they hit me with the cables, my skin turned blue for two or three weeks, but there was no bleeding. At the end of the day they told me tomorrow would be worse. So I could not sleep. Then on the third day, the interrogation lasted about 18 hours. They beat me from time to time and make me wait in the waiting room for one to two hours before resuming the interrogation. While in the waiting room I heard a lot of people screaming. They wanted me to say I went to Afghanistan. This was a surprise to me. They had not asked about this in the United States.

They kept beating me so I had to falsely confess and told them I did go to Afghanistan. I was ready to confess to anything if it would stop the torture.¹²

Arar was finally released in October 2003. Bill Graham, Canada's Foreign Affairs Minister at the time, credited Arar's release to quiet diplomacy.¹³

Liban Hussein

Liban Hussein's story is not as tragic as Maher Arar's if only because Hussein did not find himself in a torture cell. Nonetheless, like Arar, Hussein also appears to be the victim of over-zealous law enforcement in the name of national security. He lost his livelihood and his reputation as a result of false claims, made by both the US and Canadian Governments, that he had connections to terrorism. On 7 November 2001, Liban Hussein, a Somalian-born Canadian citizen was placed on a list of 62 people accused by the US government of supporting terrorism. Hussein ran Barakaat, North America Inc., a money transfer business, based in Dorchester, Massachusetts, along with his brother.¹⁴

The money-transfer business, known as *hawalas*, had become an important method for transplanted Somalis to send funds to relatives in Somali because war in that country had destroyed its banking infrastructure. The American Government, intent on shutting down the financing of terrorism, came to regard *hawalas* with suspicion because they move money around the world with little paperwork. On 7 November 2001, President George W. Bush announced that the al-Barakaat network, which included Liban Hussein's company, provided funding to Al Qaeda. Bush claimed that *hawalas* funnelled millions of dollars from the United States to terrorist organizations, including Al Qaeda.¹⁵

The United States listed al-Barakaat as a terrorist entity in the United States along with its owners, Liban Hussein and his brother.¹⁶ That same day, the Canadian Government also listed Liban Hussein, his brother and their company as terrorists.¹⁷ Canada adopted the American list apparently with no questions asked. Canadian officials did not conduct an investigation into the accuracy of the list but adopted the analysis of US officials as sufficient to satisfy the ‘reasonable grounds’ criteria required before an individual or entity could be officially labelled ‘terrorist’ under Canadian law. Conclusions drawn by a foreign government appeared to be good enough for Canadian officials and law. The United Nations Security Council also listed Liban Hussein as a terrorist; thus requiring all states to freeze any and all of Mr Hussein’s funds and assets.¹⁸

At the time, Liban Hussein was in Ottawa. The American Government asked Canada to extradite him. Hussein was arrested by the Royal Canadian Mounted Police (RCMP); however, a court released him on bail as evidence of terrorist links could not be produced. Eventually, Liban Hussein was cleared of the allegations made against him. In June 2002, seven months after he was originally listed as a terrorist, Hussein was taken off the terrorist list in Canada. However, he remained on the American and United Nations lists until the Canadian Government sought his de-listing in those jurisdictions as well.¹⁹ All of Mr Hussein’s dealings were frozen from November 2001 to June 2002 when the Canadian Justice Department announced that, having reviewed the US material, there was ‘no evidence he was connected with terrorist activities’ and the United States dropped its extradition request.²⁰ Hussein’s brother was convicted in the United States for charges unrelated to terrorism. He spent 18 months in jail for running a money-transfer business without a licence. A similar offence does not exist in Canada. No allegations of terrorist connections or terrorist financing were made at the trial of Hussein’s brother in the United States. Eventually, Liban Hussein settled with the Canadian Government for an undisclosed amount and he has remained out of the public eye.²¹

CONSTRUCTING NON-CITIZENS: DENIAL OF CITIZENSHIP RIGHTS

Maher Arar and Liban Hussein’s stories illustrate that one cannot understand the consequences of the war against terrorism by simply reading the law on the books. Rather, one has to closely examine the lived reality of the individuals who have been most affected by anti-terrorism laws. An examination of Arab and Muslim experiences reinforces that the law does not discriminate explicitly on the basis of race; however, it has a race-

based impact. Optimists would say that we have made progress in human rights protection by the simple fact that law no longer explicitly dispossesses communities based on race. Cynics, however, might claim that law has simply become clever in its deception – promising respect for human rights but delivering delusion rather than protection. Ultimately, we are obliged to neither position. Rather, both possibilities exist within our legal landscape. We must be aware of how the law reflects itself in people's lives so that we can fully evaluate the costs of the war against terrorism and consciously chart the route which we want to adopt as a society.

Canadian Arabs and Muslims are not alone in claiming that the Canadian Government has failed to respect their citizenship rights when they needed them most. William Sampson, for example, has written an account of his torture in a Saudi jail. Sampson has scathingly criticized the Canadian Government for failing to secure his timely release.²² To date, however, only Arab and Muslim men have claimed that Canadian officials directly played a role in the deprivation of their citizenship rights and thus constructed them as non-citizens. The following section outlines the manner in which citizenship is racialized in Canada.

Mobility Rights

Section 6 of the Canadian Charter of Rights and Freedoms recognizes that 'Every citizen of Canada has the right to enter, remain in and leave Canada'.²³ This right, however, proved illusory for Maher Arar. Instead of being allowed to return to Canada as he had requested of US officials, Arar was instead deported to Syria, his country of birth. It is important to acknowledge that Arar is a dual citizen of both Canada and Syria; however, dual citizens faced with deportation from another country have the right to determine which country they want to enter. Arar clearly and unequivocally expressed to US officials his desire to be returned to Canada. Moreover, he explained to both US officials and Canadian consular staff that he feared being deported to Syria and further feared being tortured in Syria if he were deported.²⁴

Once a citizen makes a request to return to Canada, she or he cannot be denied the right to 'enter' as recognized in section 6 of the Charter. Indeed, the right to enter one's country is arguably the most important right of citizenship. The right to make demands against state borders constitutes the quintessential mark of citizenship: citizens can make claims against state borders by virtue of their status; non-citizens cannot.

At the time of writing, it would appear that Canadian officials did not directly deny Mr. Arar the right to return to Canada in the sense that they did not turn him back at the border. Nonetheless, a rights violation can

be the result of both direct and indirect government action. The argument that Arabs and Muslims are being denied the rights of citizenship including the right to return to Canada turns to a large extent on the finding that Canadian officials played some role in the Arar saga. Justice O'Connor has concluded that, 'there is no evidence that Canadian officials participated or acquiesced in the American authorities' decisions to detain Mr. Arar and remove him to Syria'.²⁵ However, they did share information with American officials which portrayed Mr Arar 'in an inaccurate and unfair way'. Canadian officials, for example, described Mr Arar and his wife as 'Islamic extremists suspected of being linked to the al-Qaeda movement'.²⁶ This negligent sharing of information increased the risk that Mr Arar would be abused by foreign governments, particularly in the sensitive months following 11 September.

Although he was unable to definitively determine whether Canadian officials could have secured Mr Arar's release at an earlier point in time, Justice O'Connor also raised serious concerns about specific acts of Canadian officials which 'could have had an effect on the time taken to release Mr. Arar'.²⁷ For example, he noted that Canadian officials received a summary of a statement Mr Arar allegedly made to Syrian officials about his connections to terrorism. Foreign Affairs Canada failed to adequately consider whether the statement was the product of torture. Instead, they shared it with various security agencies.²⁸

Canadian officials may not have directly taken Mr Arar to Syria or denied him the right to return to Canada. However, their actions, taken together, constitute an indirect violation of his right to enter Canada. Canadian officials played a sufficient role in the detention of Mr Arar in the United States and his imprisonment in Syria for one to conclude that Mr Arar was denied his right to enter Canada by Canadian officials. The possibility that Canadian officials knew about or facilitated Mr Arar's detention in the United States translates into a denial of Mr Arar's right to enter Canada because of the negligence of Canadian officials. Canadian officials knew or should have known about US policies or practices such as extraordinary rendition and their practice of deporting non-citizens to countries where they face risk of torture.²⁹ If they contributed to his detention in the United States, then they were negligent in not putting into place safeguards against the extraordinary rendition of Mr Arar. By helping to create the conditions which lead to his rendition, they denied him the right to enter Canada by necessary implication. If the actions of Canadian officials lengthened Mr Arar's detention in Syria, then they denied Mr Arar his right to enter Canada as a corollary of preventing him from leaving Syria as soon as possible.

Despite the Canadian Government's steadfast refusal to disclose documents related to the detention and torture of Mr Arar, vital information

emerged from official testimony given at the inquiry. This information suggested that Canadian policy and practices as well as the conduct of certain Canadian officials did indeed contribute to the detention and torture of Maher Arar in Syria. Of course definitive statements about the role of Canadian officials must await Justice O'Connor's final report. However, several points emerging from the inquiry deserve to be emphasized at this stage because they point to the strong possibility that, at the very least, even prior to the release of Justice O'Connor's report, information emerging from the inquiry pointed to the strong possibility that Canadian officials were negligently sharing information about Canadian citizens with foreign governments without ensuring that the information was accurate or employed in a responsible manner.

First, an internal investigation by the Royal Canadian Mounted Police (RCMP) into Maher Arar's case found that the agency did not properly follow the rules regarding information sharing with other agencies.³⁰ Moreover, the inquiry has also revealed that information about innocent people can be entered into a database and provided to foreign governments. The day to day sharing of information is not documented and there is little follow-up to determine how foreign governments use this information.³¹ In addition, Canadian security agencies share information with governments that are known to use torture and, under certain circumstances, they accept information from foreign governments about individuals even at the risk that the information was obtained under torture.³² Indeed, Canadian officials often do not know if torture was used to obtain the information in the first place and have not fully directed their minds to the definition of torture.³³

Even more disturbing, an internal RCMP investigation indicates that, although they did nothing to encourage it, the police force knew that Maher Arar would be sent to Syria, given that he had dual citizenship there.³⁴ Moreover, Canadian officials knew that another Canadian citizen, Mr Al Maati had complained about being tortured in Syria as a result of a terrorist investigation.³⁵ Given that American officials were interrogating Arar about alleged terrorism connections, Canadian officials thus knew or ought to have known that he might be tortured if deported to Syria for the purposes of determining if he had connections to terrorism. The inquiry also raises questions about whether Canadian officials sought to benefit from the information obtained by Syrian intelligence from Arar.³⁶ At the time of Arar's detention in Syria, Canadian officials were clearly concerned about sending the message to American officials that Canada was committed to fighting terrorism.

Overall, one gets the impression that insufficient attention was paid to the possibility that Mr Arar was being tortured.³⁷ Although the details are not

fully known, it may even be that the Canadian Security Intelligence Service (CSIS) requested that Arar be kept in Syria. At the very least, they did not want Arar returned to Canada and thus showed reluctance in asking Syria to return him to Canada.³⁸ It is clear that CSIS officials visited Syria on a liaison mission while Arar was in custody but it appears that CSIS officials did not visit Arar during this visit.³⁹ Finally, an internal RCMP investigation reveals that during the two weeks Arar was in US custody, a number of RCMP officials were in frequent contact with US officials, even providing a list of questions for Arar's interrogation. Indeed, according to former US Secretary of State Colin Powell, the RCMP provided information used by the US authorities to justify their actions against Mr Arar.⁴⁰ The American press reports that officials detained Arar in New York because he appeared on the American watch-list of terrorist suspects.⁴¹

Even if the RCMP did not directly facilitate or encourage Arar's deportation to Syria, one must still ask whether the RCMP and other Canadian officials negligently allowed Mr Arar to be delivered to Syria. Their negligence would arise in part from the manner and extent to which they shared information with foreign governments. Perhaps the most disturbing finding made by Justice O'Connor relates to the manner in which information was shared by Canadian security and policing agencies with their international counterparts. Justice O'Connor details how the RCMP, often acting in violation of their own policies, provided false and misleading information which was inflammatory and unfairly prejudicial to Mr Arar. 'The potential consequences of labelling someone an Islamic extremist in post 9-11 America are enormous'.⁴² However, Canadian officials did exactly that to Mr Arar and his family. As the Arar story reveals, the sharing of information renders individuals vulnerable to abuses by foreign governments and increases the risk that foreign agencies will use the information to justify acts that might prove unacceptable to Canadians and Canadian officials.⁴³

Despite these risks, Canadian security agencies and other Canadian officials failed to introduce precautionary measures designed to protect citizens' rights. Instead, individual officers were often left to decide for themselves when and how to share information. One would reasonably expect that additional precautionary measures would have been developed hand in glove with the decision to share information with foreign governments. Yet, the Arar story reveals that there was little if any accountability when individual security agents decided to act and little consideration for the profound human rights violations that might be triggered by their actions. Justice O'Connor's much anticipated policy report is due in the spring of 2007 and will include recommendations for improving the accountability of the RCMP.

Freedom from Torture

Under international law, the right to be free from torture constitutes an absolute right from which no derogation is permitted. This right applies to everyone, regardless of citizenship status. States are also required to respect the principle of *non-refoulement* which dictates that refugee claimants are not to be deported to countries where they may face forms of persecution, including torture. Similarly, section 12 of the Canadian Charter provides that ‘everyone has the right not to be subjected to any cruel and unusual treatment or punishment’, which of course includes torture. Section 12 clearly prohibits the use of cruel and unusual treatment by Canadian officials on Canadian soil, again with respect to everyone and not just citizens.

Canadian jurisprudence, however, has left the door open to sending a non-citizen to torture in another state pursuant to the *Immigration and Refugee Protection Act*. In *Suresh v. Canada*, the Supreme Court of Canada, while stressing that deportation to torture generally cannot be condoned, nonetheless observed:

We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1.⁴⁴

The implication is that Canadian officials may deport non-citizens to torture, albeit under exceptional circumstances. It is important to note, however, that the court clearly expressed its expectation that non-citizens would be permitted a legal review of their case. While the procedures under which such review would take place have not been defined, it is clear that the court contemplates that the procedure would be defined in law and that the subject individual would be given legal protections and oversight through judicial review.

In contradistinction to non-citizens, Canadian officials are prohibited from sending citizens to be tortured abroad under any circumstances. Nonetheless, it appears that Canadian policies and practices not only contemplate the possibility that citizens would be sent abroad to be tortured but in fact create the conditions under which torture can become a reality. Unlike the United States, Canada does not clearly engage in extraordinary rendition or the direct contracting out of torture. Nothing revealed publicly at the Arar Inquiry to date points to use of such a practice, although it should be noted that a good number of documents have been redacted.⁴⁵

Although there is insufficient evidence to support the claim that Canada engages in extraordinary renditions, evidence is emerging to support the conclusion that Canada engages in what might be called ‘rendition by proxy’.

That is, while we do not know whether Canada directly contracts out torture, there is sufficient information to support the view that Canada creates the conditions to allow foreign torturers access to specifically identified Canadian citizens. The most salient feature of rendition by proxy is that Canada will share names with foreign governments, even where the Canadian Government may consider the named individuals innocent, knowing that once they travel outside Canada, the named individual is vulnerable to being picked up by foreign officials and knowing that the named individual may be taken to torture chambers to be interrogated. The disturbing questions that must be asked are: rather than directly contracting out the torture of its citizens, does Canada simply allow foreign governments to pick up Canadian citizens when they are travelling? And, do Canadian officials wittingly or unwittingly provide the information to facilitate this result? It is instructive to note that Canadian officials can legally ask foreign governments to share information from terrorist suspects, including Canadian citizens, even if the information is obtained through torture.

Thus, while Canadian law has opened the front door to the possibility of sending a non-citizen to be tortured abroad, it appears to allow this result in relation to citizens furtively through the back door. Again, the manner and extent to which Canadian law permits its security agencies to interact and share information with national security agencies around the globe represents the basis upon which non-citizenship status is constructed.

Due Process Rights

Often, citizens in Canada have greater procedural protections than do non-citizens. The Supreme Court of Canada has clearly articulated this point in *Chiarelli*.⁴⁶ In *Chiarelli*, the court faced a Charter challenge to the *Immigration Act* provisions that call for the mandatory deportation of permanent residents involved in serious criminality. Chiarelli challenged the constitutionality of the deportation provisions in the immigration scheme. He argued that deporting permanent residents convicted of certain offences without consideration of the circumstances violated his right to equality because citizens convicted of such offences could remain in Canada. In dismissing Chiarelli's claim, the Supreme Court stressed that because non-citizens do not have an unqualified right to enter or remain in Canada, parliament has the right to adopt immigration laws and policies which define when an individual can in fact remain in Canada. As a result, it has proven virtually impossible to challenge the process whereby a non-citizen's claim to enter or remain in Canada is decided. The courts will generally defer to the legislature on such matters.

In the anti-terrorism terrain, the different levels of procedural protection afforded citizens versus non-citizens is preserved to a certain extent. For example, both the *Immigration and Refugee Protection Act* and the *Criminal Code of Canada* contain preventative arrest provisions. The former applies exclusively to non-citizens while the latter technically applies to both citizens and non-citizens. The *Criminal Code of Canada* introduced detention without charge in section 83.3(2). Acting on information laid by a peace officer, a provincial court judge may order the arrest of a person if there are 'reasonable grounds' to believe that an act of terrorism will be prevented and that the arrest of a person is necessary to prevent the carrying out of terrorist activity. Generally, the individual can be held for a maximum of three days without charge. An individual held under the preventative arrest provisions of the *Criminal Code* can agree to a recognizance order under section 83.3(8). If they refuse to agree to recognizance, then they can be subject to 12 months' imprisonment. By contrast, immigration legislation permits indefinite detention without charge on allegations of membership in a terrorist organization. The *Criminal Code* requirement that national security agencies be concerned that the non-citizen is about to commit a terrorist activity does not apply in relation to non-citizens.

On its face, Canadian legislation thus appears to preserve a distinction between citizens and non-citizens and grants citizens a larger bundle of rights than are afforded to non-citizens. To be sure, there is much to criticize about this distinction. However, the distinction drawn between citizen and non-citizen in legislation such as the *Immigration and Refugee Protection Act* and the *Criminal Code of Canada* obscures the fact that in other important respects, the war against terrorism renders citizenship status irrelevant. Both citizens and non-citizens can be officially labelled 'terrorist' by the state purely through an administrative listing procedure with absolutely no due process rights attached. Citizenship becomes less meaningful in this context, at least at the front end of the process. As Liban Hussein's story illustrates, both citizen and non-citizen can be added to the terrorist list and deemed to be terrorists without investigation.

While citizens can challenge this designation if a charge is ultimately laid under the *Criminal Code of Canada*, charges need not be laid. An individual can be listed without ever being charged. Until charges are laid, the citizen has very few effective avenues to challenge the terrorist designation and it is better to be charged for some terrorist-related offence under the *Criminal Code* than not charged at all. This is clear from the experiences of Arab Muslim men like Abdullah Al Malki, the man whose relationship with Arar took Arar down the torturous path to Syria and back. Al Malki was held for two years in Syria on suspicion of being a security risk and he thinks that Canadian officials passed on information to the Syrians that led to his

arrest. He has been under surveillance in Canada for several years. He has lost his business and his friends. Few want to associate with him for fear of being labelled a terrorist or also coming under security scrutiny. Al Malki has asked to be charged so that the allegations against him can be tested but no charges have ever been laid.⁴⁷

Absent criminal charges, both citizen and non-citizen lack effective mechanisms to contest their being listed. In the end, the terrorist label can be applied to the citizen as easily as it can be applied to a non-citizen and the labelling itself can have significant legal and social consequences. For example, once Liban Hussein was listed as a terrorist by Canada, it became a criminal offence for individuals or institutions in Canada or abroad to have financial dealings with him. The mere fact of being listed resulted in Hussein being ostracized, unable to find a job, and his livelihood destroyed.⁴⁸ His family, moreover, was traumatized even though Hussein was never officially charged with any crime in Canada and indeed, according to the available information, was never the object of security investigation in Canada. Hence, while the distinction between the *Immigration and Refugee Protection Act* and the *Criminal Code of Canada* remains meaningful in many respects, it is also irrelevant in many respects.

The fates of citizens Hussein, Arar and others parallel those of non-citizens who have come under scrutiny for alleged links to terrorism. Both innocent citizen and innocent non-citizen have had their lives shattered by state action in the name of Canadian national security. Stephen Toope, who was mandated by the Arar Inquiry to assess the credibility of Mr Arar's claim that he was tortured in Syria, gives a glimpse into the impact of the war against terrorism on Mr Arar and his family:

I conclude that Mr. Maher Arar was subjected to torture in Syria. The effects of that experience, and of consequent events and experiences in Canada, have been profoundly negative for Mr. Arar and his family. Although there have been few lasting physical effects, Mr. Arar's psychological state was seriously damaged and he remains fragile. His relationships with members of his immediate family have been significantly impaired. Economically, the family has been devastated.⁴⁹

THE LIVING LAW OF ANTI-TERRORISM

Citizenship is not meaningless in Canada. On the contrary, Maher Arar's experiences propelled the Federal Government to establish a Commission of Inquiry which is headed by Justice Dennis O'Connor, one of the most respected and reputable judges in the country. The inquiry was called in part because of the national abhorrence at the thought that a Canadian citizen might have been subject to torture and that Canadian officials might

somehow have been involved. By contrast, Canadian officials deport non-citizens to countries where they face some risk of torture but few notice such events. Moreover, Liban Hussein reached an out of court settlement with the Federal Government, the terms of which have not been disclosed. Presumably, part of the harm for which compensation was sought includes the loss of reputation and being falsely labelled a terrorist.

By contrast, almost two dozen Pakistani non-citizens in Canada were falsely labelled terrorists as a result of an immigration investigation called 'Project Thread'. It soon became clear that the men had no connections to terrorism. Notwithstanding this fact, they were deported. According to reports published in Canada, the men are threatened in their countries and they cannot find work to support their families because the terrorist label continues to hound them.⁵⁰ In addition, at least five non-citizens, all Arab Muslim men, have been held in custody in Canadian jails without charge under the preventative security provisions of the *Immigration and Refugee Protection Act* on the possibility that they may harbour terrorist links.⁵¹

Yet, Maher Arar and Liban Hussein's citizenship stories are not isolated. With the passage of time, more stories are emerging about wrongful accusations against Arab and Muslim Canadian citizens and their mistreatment outside Canada in circumstances which appear to implicate Canadian officials. Collectively, these stories call into further question the extent to which Canadian citizenship rights prove effective for members of the Arab and Muslim community. For example, Abdullah Al Malki has stepped forward and indicated that he too was tortured in Syria as a result of information provided by Canadian officials.

Al Malki and Arar shared the same cell in Syria. When Maher Arar first returned to Canada, he recounted seeing Al Malki:

On around September 19 or 20, I heard the other prisoners saying that another Canadian had arrived there. I looked up, and saw a man, but I did not recognize him. His head was shaved, and he was very, very thin and pale. He was very weak. When I looked closer, I recognized him. It was Abdullah Al Malki. He told me he had also been at the Palestine branch, and that he had also been in a grave like I had been except he had been in it longer.

He told me he had been severely tortured with the tire, and the cable. He was also hanged upside down. He was tortured much worse than me. He had also been tortured when he was brought to Sednaya, so that was only two weeks before.

I do not know why they have Abdullah there. What I can say for sure is that no human deserves to be treated the way he was, and I hope that Canada does all they can to help him.⁵²

Another Ottawa resident Ahmad El Maati also found himself ensnared in allegations of having terrorist connections. El Maati came under suspicion of terrorist activity because of a map found in his possession which marked

off nuclear facilities, virus labs and other government sites in Ottawa. He was interrogated by American and Arab security agents and, he alleges, tortured in Syrian and Egyptian jails in part because of that map. The precise role of Canadian authorities in El Maati's detention remains to be determined; however, it is clear that El Maati did come under some suspicion by CSIS and it is quite probable that his name was forwarded to security agencies in other countries by Canadian authorities. At first blush, the map looks suspicious because it marks nuclear facilities, a virus lab and other supposed terrorist targets in Ottawa. An investigation by a newspaper reporter in Canada, however, revealed that the map was nothing more than a document issued by the Federal Government for tourists. The nuclear facilities, virus lab and other sites were marked on the map by tourism officials in Ottawa. But, this point appears to have escaped the attention of national and international security agencies.

The reporter who investigated the case made the following observations:

It is the map of Ottawa – with clearly marked federal nuclear facilities, a virus lab and other supposed terrorist targets – that fuelled an international panic and played into a chain of Middle East detentions of Canadians citizens.

The map was of huge interest to U.S. border guards, who grilled Canadian truck driver Ahmad El Maati for hours about it. So, too, did interrogators in Syria and Egypt, where Mr. El Maati says he was tortured and repeatedly asked about the map's provenance.

The Globe and Mail has learned that the map – scrawled numbers and all – was in fact produced and distributed by the Canadian federal government. It is simply a site map, given out to help visitors to Tunney's Pasture, a sprawling complex of government buildings in Ottawa, find their way around.⁵³

To date, the Canadian government has refused to call an inquiry into the treatment of Al Malki, Al Maati and another man, Muayyed Nureddin. All three men allege that they were tortured abroad with the complicity of Canadian officials.⁵⁴ This is unfortunate for the individuals and families whose lives have been profoundly affected in the name of national security. It is also unfortunate for the integrity of the war against terrorism.

CONCLUSION

The Canadian Government has consistently claimed that the anti-terrorism legislation balances the rights of individuals with the need for collective security. Yet, there are no mechanisms in place to adequately assess the impact of the war against terrorism on people's lives. To adequately assess

the trade-off between liberty and security, one needs to know something about the consequences – particularly the unintended consequences – of the legal regimes under consideration. As the stories of men like Maher Arar and Liban Hussein demonstrate, the individual and community costs are significant.

Once again, the long arm of global conflict has permeated Canadian borders, but not in military form. Canada's participation in global conflicts takes legal dimensions. The war against terrorism has reconfigured the relationship between Arab and Muslim identity and citizenship. Most significantly, Arab and Muslim citizens in Canada cannot assume that the fact of their citizenship will afford them the protection of the Canadian state in the face of acts of foreign governments. This reconfiguration of citizenship does not appear in any legislated pronouncements or policies, rather it is the consequence of the operation of the laws, policies and practices that form the foundation of the war against terrorism and that have embedded racialization into Canadian citizenship status.

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