

The Case of Omar Khadr and the Two-Tiered Canadian Citizenship Model

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This paper focuses on the case of Omar Khadr, a Toronto-born Muslim-Canadian citizen who was captured by the American Armed Forces in a bombed-out compound in Afghanistan in 2002. Khadr spent a decade of his life detained, often in solitary confinement, in Guantanamo Bay, which had been controversial for allegations of torture against its detainees (cite). In 2012, Khadr pled guilty before a military tribunal for throwing a grenade that fatally wounded an American soldier – a guilty plea he later recanted. As for the Liberal government’s \$10-million compensation and apology to Khadr, Canadians remain divided. Through using the case of Omar Khadr, I will argue that one’s status as a Canadian citizen is not an absolute guarantee to shield people from abuse, dispossession, stigmatization, prejudice, and racialization. Additionally, I suggest that Canada subscribes to a double standard when it comes to protecting its citizens, as seen in its complicity in Khadr’s case, as well as its deliberate stonewalling of his repatriation. Most importantly, I intend to demonstrate that racialization and prejudice are the main reasons why Khadr was deprived of the protections and rights, which should have been guaranteed to him, given his Canadian citizenship.

Introduction

What makes a Canadian citizen an “ideal Canadian”? Are some Canadians “more Canadian” than others and thus, more deserving of the rights that citizenship entails? Many of those who closely followed how Omar Khadr’s case unfolded had these questions in mind. Khadr is a Toronto-born Canadian citizen who was captured by American Armed Forces in a bombed-out compound in Afghanistan back in 2002, a year after one of the deadliest terrorist attacks on American soil (Cote and Henriquez 2010; Gibson and Covacs 2010). Khadr’s case suggests that Canadian citizens are categorized into two groups. Some political commentators call this system “two-tiered citizenship” (Khan 2008; Pagtakhan 2016). The first-tier of Canadian citizens are full citizens, meaning they are guaranteed full access to the rights and privileges that come with their “formal citizenship” (Sedef 2005, 41). On the other hand, the second-tier of Canadian citizens is composed of those who are merely regarded as “technically Canadians.” Second-tier Canadians, unlike first-tier citizens, cannot rely on their formal citizenship to gain full access to rights and privileges that normally come with Canadian citizenship. In fact, they face exclusion, dispossession, and alienation from the Canadian political

community. In this paper, I will argue that the Canadian model of citizenship is two-tiered and that a person's race and religion are the determining factors as to which category they will fall under. This argument is supported through an analysis of three major occurrences in Khadr's case: the government's complicity in the violation of his rights, the Supreme Court's failure to address all the breaches of his citizenship rights, and the government's refusal to repatriate him to Canada.

Canada's Complicity in the Violation of Khadr's Rights

Canada's complicity in the violation of Khadr's Charter rights supports the notion that he belongs in the second-tier of citizens, which means he does not qualify for the full protection of rights that are enjoyed by first-tier citizens. Arguably, the reason for this is his race and religion. The Supreme Court of Canada's held that the Canadian state had indeed violated Khadr's Charter rights while he was abroad:

Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by [s. 7](#) of the Charter, contrary to the principles of fundamental justice. (Canada vs Khadr 2010)

This decision pertains to the impropriety of the interrogation conducted by Canadian government officials while Khadr was 16 – without any access to legal counsel and despite knowing he had been subjected to torture (Canada vs. Khadr 2010; Canada vs. Khadr 2009). Additionally, this decision confirms that it is unlawful of the Canadian Intelligence officials to share the fruits of their interrogation with US government officials. Canada's violation of Khadr's citizenship rights attests to the notion that Khadr is a second-tier citizen, as his formal citizenship was insufficient in shielding him from racialization and denial of access to rights and privileges normally given to full citizens.

According to Wendy Chan and Dorothy Chunn (2014), two sociologists who wrote extensively about the racialization of crime in Canada, Canada's complicity in the violation of Khadr's Charter rights may be a direct result of the September 11 attacks, where the terrorists responsible were identified as Muslim men. Chan and Chunn contend that the xenophobia, bias, and suspicions toward people of Muslim and Arab origin intensified, regardless of whether these Muslims are Canadian citizens or not. This view is echoed by Yasmeen Abu-Laban (2014), who believes that since 9/11, "what Muslims [and Arabs] are up to at home and abroad became a national security concern" (408). Thus, it can be said that the two-tiered citizenship in Canada is racially marked, as even though people of Muslim and Arab origin may be Canadian citizens, their citizenship is not a blanket-guarantee that they will be protected from the unfair and sometimes baseless suspicions by the state which first-tier citizens rarely, if never, experience.

Valentina Capurri (2016), an expert in the geography of citizenship, captured this idea of racialization as a major factor for classifying Khadr as a second-tier citizen: "Omar Khadr is among those individuals who the state has decided do not belong... assumed guilty by reason of their race or ethnicity, and are left with the task of proving their innocence in order to be recognized as citizens" (156-57). Indeed, the moment Canada became involved in the breach of Khadr's citizenship rights, the virtue of his

formal citizenship or “being a Canadian,” per se, had been reduced and undervalued. If Canadian citizenship is an all-inclusive concept, then Omar should have been included in the term “everyone” in the Charter’s section 7 (Macklin 2012): “[e]veryone has the right to life, liberty, and security of the person, and the right not to be deprived thereof, except in accordance with fundamental justice. Unfortunately, as seen in Khadr’s case, Canada failed to protect any of these rights, which for Audrey Macklin (2012), a law professor who had been active in Khadr’s case, is Canada’s way of “[renouncing] its relationship with Khadr as its citizen” (233). Even worse, Canada partook in the violation of his rights. Indeed, the Canadian government’s contribution to the Khadr’s plight in Guantanamo is an illustration of the notion that he is a second-tier citizen, which means his fundamental rights as a Canadian is less likely to be dignified compared to those who fall under the first tier. Additionally, his categorization as a second-tier Canadian is believed to have racial overtones.

Those who disagree with the notion that there is a two-tier citizenship system and that this is racially marked might argue that Khadr’s case is not the first time Canada violated the Charter rights of its citizen(s). They might even supplement this objection by saying that the rights of some white, non-Muslim Canadians have also been violated by the government in the past. Therefore, it is misleading to assume that there is a two-tier citizenship system and that “playing the race card” is wrong (Hoppe 2009). As a response to this possible objection, we must remember that the breach to Khadr’s Charter rights is extraordinary. Unlike other cases, assuming there are more, whereby Canada also violated the Charter rights of citizens including white and/or non-Muslim Canadian(s), the present case shows a government that deliberately colluded, participated, and “effectively collaborated with U.S. military authorities” in the mistreatment of its own citizen (Glavin 2017), which in the words of Canada’s top court: “offends the most basic Canadian standards” (*Canada vs Khadr* 2010). Put another way, the Canadian government has willfully aggravated Khadr’s appalling condition abroad it sent officials to interrogate him and when they shared evidence with US officials to ensure his conviction. Aside from that, we have reason to believe that there is a spectre of racialization here, since Muslim Canadians, as many scholars have argued, had been subject to intense negative suspicions, securitization, prejudice, dispossession, and xenophobia in the post-9/11 era (Chann and Chun 2014; Abu-Laban (2014); Aitken 2008; Jiwani 2012).

The Supreme Court: Also Participatory in the Breaches of Khadr’s Rights?

The Supreme Court of Canada is arguably complicit too in the continuous violation of Khadr’s rights for two reasons: first, the court failed to explicitly address other Charter rights that had been breached in Khadr’s case; and second, the Court stopped short at ordering the government to repatriate Khadr.

Although the Supreme Court, in its 2010 decision in *Canada vs Khadr*, ruled in favour of Khadr’s team by ruling that his Charter rights had indeed been violated, the Court has also contributed to the ongoing violation of his rights when it failed to tackle other Charter rights that had been breached in his case. As we know, the Court has decidedly ruled that his rights under the Charter’s section 7 had been violated (*Canada vs Khadr* 2010). However, his right not to be arbitrarily detained, to have a trial by an impartial and independent tribunal, be tried within a reasonable time – which are all Charter rights too – were left unaddressed by the Court. By not paying enough attention to the other Charter rights that had

been breached, the Court ignored the ongoing torture and violation of Khadr's rights, which raises doubts as to the Court's allegiance to the rule of law and to the Canadian constitution (Woo 2012).

According to Grace Woo (2012), a member of the Lawyers Rights Watch Canada, the idea that our Supreme Court failed to address Khadr being detained for at least 5 years without any charges, in a place designed to operate "beyond the purview of the rule of law" (Pugliese 2011, 165) and be kept by captors who use horrific torture ways other than sleep deprivation, suggests that the Court deliberately "ignored the gravity of the situation" (317). Additionally, Woo (2012) explains that such failure of the court may be attributable to the perception many had about Muslims Canadians and Middle Eastern people as "desert nomads engaged in terrorist activities" (321) in the post-9/11 era. This reinforces the argument that there is a two-tier citizenship system in which Khadr had been systematically sequestered to the second-tier of citizens due to his race and religion. And this time, the Court had contributed to the continuing deprivation of his citizenship rights.

In addition to its failure to address other rights breached in Khadr's case, the Court was also participatory in the ongoing violation of his citizenship rights abroad when it reversed the order of the Federal Court and the Federal Court of Appeals in 2009 to repatriate Khadr (Chung 2010). Gail Davidson (2012), a retired lawyer and academic whose interest is in the study of international human rights, criticized the 2010 Supreme Court reversal of the Federal Court's repatriation ruling as "[laying] the foundation for more inaction" (258). Davidson's view is justified by the fact that Canada remained inactive about Khadr's repatriation after the 2010 ruling. A 2012 poll indicates that an overwhelming 60% of Canadians remained vehemently opposed to his return (Akin 2012). This is important because even though the Supreme Court, technically speaking, has the power and jurisdiction to order the federal government to repatriate Khadr (Makin 2010; Macklin 2012; Canada vs Khadr 2010), they chose not to. Most importantly, this is crucial because it has often been thought that the Supreme Court is the impartial last line of defense when citizenship rights have been violated. Sadly, as law professor, David Schneider (2010), points out, there is a double-standard here, which is consistent with the notion that the Canadian model of citizenship is two-tiered and is racially marked, since "...in other cases...the Court has ordered Canada to seek assurances" from other countries when the rights of its citizen(s) is/are threatened. The salient point is that the Supreme Court decision in 2010 gives thrust to the argument that the Canadian model of citizenship is two-tiered, whereby Khadr is situated in the second-tier of citizens because of the negative outlook associated with his race and religion. Therefore, he cannot fully rely on his country to defend, uphold, and dignify the rights he would ordinarily have if he was a first-tier citizen.

The Canadian Government's Deliberate Attempt to Block Khadr's Repatriation

The Canadian government's efforts to obstruct Khadr's repatriation suggests that citizenship in two-tiered, in which Khadr is categorized as a second-class citizen. When the Federal Court ordered his repatriation because they believe Canada had offended Khadr's fundamental rights under the Charter, and when the Federal Court of Appeal upheld that order, the implacable Harper government unyieldingly fought those orders all the way to the Supreme Court of Canada. Undoubtedly, the government did not hesitate to spend millions of dollars to impede Khadr's impending repatriation (Shepard 2017).

Some might argue that the reason the Canadian government could not bring Khadr back is that it would disrespect the United States' jurisdiction over their own affairs to do so. This is a fair objection to raise since the United States has no legal obligation to approve repatriation requests from the Canadian government or the Canadian Supreme Court. Therefore, others might understand why the Canadian government just wanted to leave the Khadr matter in the hands of the US government. However, the Canadian government, both the Liberals and Conservatives, never even bothered to ask the United States to hand over Khadr back to Canada. (Shepard 2017). In fact, the United States had to be the one to work for Khadr's return to Canada: they were the one who took the initiated talks with the Canadian government to take Khadr back to Canada after his plea bargain in 2010 (Dunn 2012). Even Ezra Levant (2011), one of Khadr's staunchest critics, affirms this: "getting rid of Omar Khadr, a Guantanamo celebrity inmate, remained a [US] political priority" (188). All these facts are crucial for us to fully visualize and understand that it was the Canadian government that tried to drag its foot on the issue of Khadr's repatriation.

Augustine Park (2014), a sociology professor who wrote extensively on the discourses of racialization, suggests that there are racial undertones in blocking Khadr's repatriation: "...the Muslim other is equated with the inescapably cultural, where culture becomes a code for discourses of terrorism, extremism, fanaticism, and bloody-mindedness, along with patriarchy, oppression, and an irrational, unprovoked hatred of all things..." (48). Further, Park (2014) argues that the government's refusal to bring Khadr is "animated by cultural racism" and has underpinnings related to the theory of a "clash of civilizations," wherein "Western and Islamic civilizations in particular are destined for conflict" (48). Khadr, being a brown-skinned Muslim-Canadian, is thus positioned in the second tier of citizens and "...rendered undeserving of the rights of 'real' Canadians, including the guarantees of state protection abroad" (45).

In the same vein, Robert Diab (2012), a criminal law expert, and Alnoor Gova (2012), a PhD candidate whose expertise is in the study of Canadian citizenship, argue that since Khadr's case has "unfolded in a religio-political context" the government felt that the parameters of rights that entail his Canadian citizenship could be "ignored and exploited" (364). Hence, it is difficult to ignore the possibility that the Canadian government's refusal to bring Khadr back in Canada is due to negative perceptions they have about people of Muslim origins. Attorney Dennis Edney, one of Khadr's lawyers, perfectly captured this notion of a two-tiered citizenship system based on race and religion, when he states that the Canadian government tries to pick-and-choose "which Canadians it should help and represent. And Omar Khadr, being a person of colour, doesn't fit into that list" (The Hamilton Spectator 2009). The overarching point is that Khadr's citizenship is not as valuable, respected, and worth dignifying as other Canadians, who belong to what we call the "first tier." He was treated as an "undeserving victim, unbefitting of state intervention and societal sympathy" (Jiwani 2012, 13). Although he is a Canadian citizen, the government's effort to block his return to Canada sends a strong message that there is a two-tier citizenship system, in which Khadr falls under the second tier.

Conclusion

It is difficult to answer the question I initially posed: What makes a Canadian citizen an ideal citizen? However, we can at least see by examining the way Canada treated Khadr that he personifies what constitutes the unideal citizen. Khadr's case suggests that formal citizenship is neither an automatic, nor a reliable guarantee of equal access to privileges, rights, and fair treatment before the law. In this paper, I examined three important occurrences in the saga of Khadr's legal battles: the government's involvement in the breach of his Charter rights, the Supreme Court's 2010 decision, and the government's determination to block and prevent Khadr's repatriation. It has been suggested that these three important occurrences in Khadr's case have all likely been affected by his racialized appearance and his identification as a Muslim. This raises an important question: Does Khadr's case involve the proper and equal application of justice? Or does it show how the Canadian state treats its citizens who are considered "different"? The case of Omar Khadr should serve as a warning to those who come to Canada hoping that this country can and will always uphold their right to equality, justice, and freedom. If the Canadian state can do what it did to Khadr, there is no doubt it can do it to other Canadian citizens too. Some of us might be privileged to belong in the first-tier of Canadian citizens for now, but who knows when the factors that determine which tier a person falls under will shift. Should we try to revise or change the current two-tiered model of Canadian citizenship to accommodate the increasing social and cultural pluralism in Canada? These questions are up to Canadians to answer.

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