

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 7

Summer 2021

The Case of Omar Khadr and the Fragilities of Canadian Citizenship

Le cas d'Omar Khadr et le modèle de citoyenneté canadienne à deux niveaux

By Keyssel Besa

Reprinted From Vol. 5 2019
Title and Abstract From Vol 5. 2019

Abstract

This paper focuses on Omar Khadr, a Muslim and Canadian citizen who was captured by American soldiers in a bombed-out Afghan compound in 2002. Khadr spent a decade of his life detained, often in solitary confinement, in Guantanamo Bay—a place infamous for allegations of torture. In 2012, Khadr pled guilty before an American military tribunal for throwing a grenade that fatally wounded an American soldier which he later recanted. This paper is a case study of how Khadr's story shows certain vulnerabilities to Canadian citizenship. More specifically, I will argue that Khadr's experience reinforces the notion that Canada does not always succeed at protecting its citizens and that formal citizenship alone does not guarantee one's Charter rights.

Ce document se concentre sur le cas d'Omar Khadr, un citoyen canadien musulman né à Toronto qui a été capturé par les forces armées américaines dans un complexe bombardé en Afghanistan en 2002. Khadr a passé une décennie de sa vie en détention, souvent isolé, à Guantanamo Bay, prêtant à controverse pour des allégations de torture contre ses détenus (citer). En 2012, Khadr a plaidé coupable devant un tribunal militaire pour avoir lancé une grenade qui a blessé mortellement un soldat américain — une réponse à l'accusation qu'il a ensuite rétractée. Quant à la compensation de 10 millions de dollars et aux excuses du gouvernement libéral à Khadr, les Canadiens restent divisés. En utilisant le cas d'Omar Khadr, je soutiendrai que le statut de citoyen canadien n'est pas une garantie absolue pour protéger les gens contre les abus, la dépossession, la stigmatisation, les préjugés et la racialisation. De plus, je suggère que le Canada souscrit à une double norme lorsqu'il s'agit de protéger ses citoyens, comme en témoigne sa complicité dans le cas de Khadr, ainsi que son obstruction délibérée à son rapatriement. Plus important encore, j'ai l'intention de démontrer que la racialisation et les préjugés sont les principales raisons pour lesquelles Khadr a été privé des protections et des droits qui auraient dû lui être garantis, étant donné sa citoyenneté canadienne.

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? Some who

closely followed how Omar Khadr's case unfolded may have had these questions in mind. Khadr is a Toronto-born Canadian citizen captured by the U.S. military in a bombed-out compound in Afghanistan—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 which means they are guaranteed full access to the rights and privileges of 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 generally come with Canadian citizenship: they face exclusion, dispossession, and alienation from the Canadian political community. In this paper, I will explore the degree to which Canada's model of citizenship is two-tiered and the potential role of one's race or religion in determining which category one will fall under. My analysis centers on three major occurrences in Khadr's case: the Canadian government's role in violating his rights, the Supreme Court of Canada's failure to address all the breaches of his citizenship rights, and the government's attempts to halt his return to Canada.

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

Canada's active hand in violating Khadr's *Charter* rights supports the idea that the rights that are hypothetically given to Canadian citizens are fragile or unguaranteed. On this point, the Supreme Court of Canada held the following concerning the government's violation of 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 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)

The Court's holding pertains to the improper interrogation of officials from the Canadian Security Intelligence Service (CCIS) while he was detained in Guantanamo. In that decision, the Court observed that his Charter rights were clearly violated primarily because these officials

did not give him any access to legal counsel despite knowing he had been subjected to torture (Canada vs. Khadr 2010; Canada vs. Khadr 2009). However, the most egregious violation of Khadr's *Charter* rights, according to the Court, is when the CSIS officers decided to share the fruits of their interrogation with U.S. government officials to secure his conviction. Canada's violation of Khadr's rights as a Canadian citizen buttresses the notion that his Canadian citizenship was vulnerable to government infringement.

According to Wendy Chan and Dorothy Chunn (2014), two sociologists who wrote extensively about the racialization of crime in Canada, Canada's complicity in violating Khadr's *Charter* rights may be a consequence 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 was echoed by 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). These scholars' views converge on the idea that Canadian citizenship is characterized by a considerable degree of fragility and that anyone can easily be targeted by government infringement.

In line with Chan and Chunn's claim, citizenship expert Valentina Capurri (2016) suggests that racialization was a significant 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 integrity of his formal citizenship had been effectively reduced and undervalued. Sharing this viewpoint, Macklin (2012) contends that the Canadian government's handling of Khadr's case abroad was tantamount to "[renouncing] its relationship with Khadr as its citizen" (233). Clearly then, the Canadian government's contribution to Khadr's plight in Guantanamo feeds into the idea that Canadian citizenship is by no means a panacea or a guarantee of the rights and privileges promised under the *Charter*.

Some might retort that Khadr's case is not the first time Canada violated the *Charter* rights of its citizens and that it is ultimately misleading to "play the race card" (Hoppe 2009). As a response to this counterargument, it must be noted that the breach of Khadr's *Charter*

rights is particularly egregious. Unlike other cases, assuming there are more, whereby Canada also violated the Charter rights of non-white and non-Muslim citizens, the government deliberately colluded, participated, and "effectively collaborated with U.S. military authorities" in the mistreatment of its own citizen (Glavin 2017). As the Court aptly remarked, Canada's actions "offends the most basic Canadian standards" (Canada vs Khadr 2010). More importantly, the Canadian government willfully aggravated Khadr's appalling condition while in Guantanamo by sending officials to interrogate him and collaborating with U.S. officials to ensure his conviction.

The Supreme Court: Also Complicit in the Breaches of Khadr's Rights?

The Supreme Court of Canada also contributed to the continuous violation of Khadr's rights when it failed to address other *Charter* rights that had been breached explicitly and when it failed to order the government to repatriate him. Although in its 2010 decision, the Court ruled in favour of Khadr by holding that his *Charter* rights had indeed been violated, the Court failed to tackle other *Charter* rights infringed on by the Canadian government. For instance, his right against arbitrary detention and a trial by an impartial and fair tribunal within a reasonable time were all left unaddressed. By failing to point out these palpable breaches of his *Charter* rights, the Court effectively ignored and had turned a blind eye to his ongoing torture and the government's indifference to his citizenship rights (Woo 2012, 337).

In line with this view, Woo (2012) argues that our Supreme Court's failure to address Khadr's detention for at least five 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 torture like sleep deprivation is evidence that the Court "ignored the gravity of the situation" (317). Woo takes it a step further by contending that such a failure can be attributed 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.

In addition to its failure to address other rights breached in Khadr's case, the Court also contributed to Khadr's plight when it reversed a 2009 order from the Federal Court and the Federal Court of Appeals to repatriate Khadr (Chung 2010). As pointed out by international human rights lawyer Gail Davidson (2012), the Supreme Court's reversal of previous decisions to repatriate Khadr "[laid] the foundation for more inaction" (258): considering that 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), it chose not to do so. The Court's failure is concerning because it is the institution that the *Constitution Act of 1982* made to be the check on executive and legislative power when *Charter* rights are trampled or infringed. Sadly, as law professor David Schneider (2010) aptly remarked, the Court may have demonstrated a double-standard in Khadr's case considering that 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 Canadian Government's Deliberate Attempt to Block Khadr's Repatriation

The Canadian government's efforts to obstruct Khadr's repatriation further suggest the vulnerability of Canadian citizenship in certain circumstances. When the Federal Court ordered Khadr's repatriation based on the evidence that Canada had patently offended Khadr's *Charter* rights, it is worth noting how zealous the Harper government was in blocking and fighting those orders. Indeed, the government did not spare any effort and expense to impede Khadr's impending repatriation (Shepard 2017) and its appeal to the SCC in 2010 is a clear proof of that.

Some might say that the Canadian government's refusal to repatriate Khadr is justified in the sense that there is an imperative to respect U.S. jurisdiction over Guantanamo where Khadr was detained. To be sure, such a justification is not without merit considering that the United States has no legal obligation to approve repatriation requests from the Canadian government or the Canadian Supreme Court. However, the Canadian government did not make reasonable efforts to advocate for Khadr's repatriation to Canada (Shepard 2017). Indeed, the United States was the one that took the initiative to make Khadr return to Canada (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 [U.S.] political priority" (188). All these facts are crucial for us to fully visualize the extent to which a Canadian citizen's *Charter* rights were deliberately set aside and ignored by the Canadian government.

For sociology professor Augustine Park (2014), there are racial overtones in the government's attempt to block 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" (42) and has underpinnings related to the theory of a "clash of civilizations," (47) wherein "Western and Islamic civilizations in particular are destined for conflict" (48). In this sense, Khadr was rendered undeserving of the rights of Canadians including the guarantees of state protection abroad.

In the same vein, criminal law expert Robert Diab (2012), and citizenship expert Alnoor Gova (2012) 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 to Canada is due to widespread negative perceptions of people who have Muslim and Arab roots. Attorney Dennis Edney, one of Khadr's lawyers, perfectly captured the notion of Canada's fragile citizenship system when he stated that the Canadian government tried 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" (qtd in. The Hamilton Spectator 2009). The overarching point is that Khadr was treated as an "undeserving victim, unbefitting of state intervention and societal sympathy" (Jiwani 2012, 13).

Conclusion

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 his repatriation. My findings reveal certain fragilities and imperfections that characterize Canadian citizenship. However, I will not go as far as making the claim that Khadr's story is just another proof that Canada is systematically racist and bigoted beyond redemption. Although it is necessary to see Canada's egregious transgressions against Khadr, a wholesome understanding of the issue warrants that we also consider the Canadian government's recent attempts to do the right thing and acknowledge its wrongdoing. In 2017, Trudeau's Liberal government offered Khadr an apology and a 10M dollar settlement as compensation for the government's failure to uphold his *Charter* rights notwithstanding widespread backlash and criticism that they knew would follow. More importantly, all things considered, I think Canada is still one of the most welcoming and hospitable places to people of colour and immigrants who come from various socioeconomic, racial, and religious background. Nonetheless, the case of Omar Khadr paints

a more nuanced picture about the degree to which Canadian citizenship and *Charter* rights are vulnerable to government indifference.

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