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The Canadian Extradition System and its Reform: Balancing Between Rights and Freedoms and National Security

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Abstract

It is often advocated that the fundamental rights of Canadian citizens enshrined in the Charter of Rights and Freedoms must not be sacrificed at the altar of national security. However, upon analyzing the Canadian extradition system, a dual standard is revealed. In one case, Dr. Hassan Diab, an Ottawa-based professor, was alleged by the French authorities in 2007 to have been involved in a 1980 synagogue bombing in Paris. After his trial within Canada (2010–14), he was finally extradited to France in 2014, jailed, eventually released, and returned to Canada in February 2018. Media reports document that Canadian Department of Justice lawyers worked assiduously to "prove" his guilt. By way of contrast, in 2011, the US's request to extradite Abdullah Khadr was rejected by the Supreme Court, citing his previous 14-month-long ill-treatment. These two cases illustrate an existing tension between coercive "force of law" and the "rule of law" and the Canadian government's uncritical stand in protecting its citizens when it comes to extradition treaty obligations. This article argues that the current Canadian extradition system established through the 1999 Act is questionable because it presupposes a person's "guilt" over "innocence" by placing the burden of proof on the accused. It also raises the question of the veracity of a large number of extradition cases in the past. The article further contends that current provisions in the Canadian Extradition Act in general and the Canada-France agreement in particular fall short of protecting a citizen's life and reputation; thus, they need reform.

My suffering and that of my family was prolonged by senior officials at the Department of Justice. I trusted the government's promise that what happened to me would never happen to anyone else.
It's a one-sided report. Its purpose is not to provide accountability. Its purpose is to absolve the Department of Justice of any accountability, and to shield senior officials at the department of any accountability.

Dr. Hassan Diab, Press Conference in Ottawa, on the event of release of the independent external review of his case, July 26, 2019.

1. Introduction

As Dr. Hassan Diab was wrapping up his sociology class at Carleton University in late fall of 2009, a French journalist approached him to inform that he was being implicated in a 1980 synagogue attack in France. This brief chat had unimaginable ramifications, which transpired in the following days. Royal Canadian Mounted Police (RCMP - Canadian federal police) and plain-clothes intelligence personnel subsequently began to show up at his home and workplace, which was followed by an arrest. As a result, he lost his academic job and his reputation as a law-abiding citizen was gravely damaged. After an unusually long trial within Canada (from 2010 to 2014), Dr. Diab was extradited to France in 2014 where he spent over three years in solitary confinement. However, he was exonerated of all charges and returned to Canada in 2018.

When the Ontario Superior Court stayed the extradition case of Abdullah Khadr (the elder brother of Omar Khadr) in August 2010, it came as a shock to the ruling Conservatives, the national security establishment, and Canadians for several reasons. First, many members of his family were directly associated with al-Qaeda in the past. Second, Mr. Khadr had been held in Toronto jail since a Boston court indicted him in December 2005 on several terrorism charges, especially supplying weapons to al-Qaeda when he lived in Pakistan in the wake of the 9/11 attacks. Third, Canada seldom denied extradition requests made by the US. For example, between 1999 and 2014, among 1500 cases, about 90% of the extradition requests came from the US to Canada [1]. And fourth, Mr. Khadr gave a self-incriminating statement in the presence of law enforcement officials in Canada, supporting his extradition.

These two cases bring forth a number of problematic aspects of the current extradition system that was enacted through an act in 1999. Within this system, "Canada is able to extradite persons to stand trial, for the imposition of a sentence or to serve a sentence, at the request of a foreign state or entity that is an extradition partner under Canada's Extradition Act" [2]. Several media reports indicate that from 2007/08 to 2017/18, it arrested 755 Canadians for extradition and extradited 681 of them to its extradition partners [3]. Although more than thirty "extradition partner" nations signed bi-lateral agreements with Canada, several countries such as Austria, France, the Czech Republic, Germany and Switzerland do not extradite their citizens [4]. Further, if the action committed is deemed as criminal in both countries (i.e., double criminality), extradition might take place and information related to the request or case remains confidential between the states. The extradition request might come with a provisional request for arrest, first followed by a full request or can commence with an initial formal request by a state.

Extradition is a form of international assistance, as explained by the government of Canada. Its treaty commitments, as carried out by the Extradition Act ("the Act"), give rise to its obligation to extradite individuals. The Act provides Canada with the legal justification for extraditing individuals who are wanted by an "extradition partner" for criminal prosecution or to impose or uphold a sentence. A schedule included in the Act names specific states as extradition partners. [5]. There are three phases to the extradition process: authority to proceed made by the Department of Justice (DOJ) officials; a judicial phase that includes the extradition hearing to be held before a judge of the superior court; and the ministerial phase, including the decision on surrender to be made by the Minister of Justice [6]. It is important to mention that appeals must be submitted first to the provincial Court of Appeal where the extradition hearing took place initially. In the event of the decision to surrender being upheld, "the individual may seek leave to appeal either or both decisions to the Supreme Court of Canada. The Supreme Court will only hear appeals that raise issues of public importance" (ibid).

It is necessary to briefly discuss the concept of "rule of law" which is a long-standing constitutional principle in Canada; the Charter of rights and freedom states that the rule of law is one of the fundamental principles upon which Canada was founded. It is mentioned in the preamble of the Constitution Act of 1982, and not only the judges dispensing justice have used it as key constitutional rhetoric, but it is also a concept that has had legal consequences in many cases [7]. In a mature democratic society like Canada, the rule of law act as the bedrock of public law system which necessitates that the courts' constitutional review authority be expanded in ensuring that constitutional duties are met, all citizens are treated equally in the eyes of law as well as preventing anyone from illegal exercise of power. The following two cases are therefore discussed within the conceptual framework of the 'rule of law' that prevails in Canada.

The aim of the article is to seek answers to three important questions about Canadian extradition system. One, how can one system produce very different outcomes concerning the charter rights of Canadians? Two, who should be the final arbiter in extradition process—judiciary or legislative? And three, how a citizen's rights are protected within the 'rule of law' when it comes to the geo-politics in general and national security in particular? Nonetheless, this article provides the contexts and outcomes of two high profile cases such as Dr. Diab and Mr. Khadr's in the Canadian extradition system. Also, it scrutinizes the Canada-France and Canada-US bilateral extradition agreements under the 1999 Extradition Act to determine if a balance between the Charter of Rights and Freedoms vs [8]. national security was upheld and suggest extradition Act reform. The article starts with the cases in discussion including timeline followed by in-depth analyses. It concludes with a set of recommendations for reform of the current extradition system.

Data for this chapter are gathered mostly from primary (e.g., court and House of Common's transcripts, interview of a journalist) and secondary sources (media data). For the purpose of this article, official records are considered that documents/ information obtained from the court records and transcripts from the House of Commons, Canada [9]. Whereas newspaper articles where timelines of these cases were mentioned are regarded as public records (S. 2020). There are several reasons behind choosing Diab and Khadr as case studies in this article to provide the reasons for extradition requests in the Canadian extradition system. These are: a) the Diab extradition stands out as one of the most intensely litigated cases of its kind in Canadian history as to the sheer length of the proceedings and the hostility between lawyers and the outcome of the case (i.e., Diab was eventually exonerated). And, b) though around 90% extradition requests originate from the US, Canadian court took an extraordinary stand not to extradite Khadr on the ground of his Charter rights violation.

1.1. Canada-France-USA Extradition Agreements and Associated Issues

Canada has extradition treaties with more than 30 countries, including Cuba. However, some countries Canada extradites citizens to do not extradite their own citizens (for example, Austria, France, the Czech Republic, Germany, and Switzerland) [4]. That begs question, why Canada is eager to extradite its citizens to the requesting states? Put simply, "the low bar for a requesting state, and high bar for an accused, leaves Canadian courts with their hands tied once the extradition ball starts rolling" (ibid). In this article, two bi-lateral treaties are discussed pertinent to the cases only.

While comparing Canada-France (signed in 1989) and Canada-US (signed in 1976) bi-lateral extradition agreements, it appears that the former contains 26 Articles with detailed explanations for an extradition process while the latter has 18 Articles and a list of 30 offenses (mentioned as "schedule" in the agreement) for which extradition can be sought. Most intriguing is the Article referring to the "arrest" of the extradition subject [10, 11].

Canada-US agreement Article 9 (3) states:
When the request relates to a person who has not yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting State and by such evidence as, according to the laws of the requested State, would justify his arrest.
Canada-France agreement Article 13 (1) states:
In cases of urgency, the competent authorities of the requesting State may request the provisional arrest of the person sought …. the request for provisional arrest shall include:
…Either a copy of the order of arrest or the "jugement de condamnation exécutoire" or, where applicable, the certificate of conviction in respect of the person sought, or a statement attesting that such order, judgement or certificate was issued in the requesting State.

If the requested State does not receive the documentation mentioned in Article 10 and the request for extradition within forty-five (45) days of the arrest, the provisional arrest will end.

Both agreements were signed before the enactment of the Extradition Act thus vary in contents. In addition, neither agreement mention about terrorism nor national security as reasons to seek extradition. Therefore, 'all extradition decisions are ultimately political' seems to be the raison d'être for the two cases discussed in this article. This is problematic as 'national security' triumphs over Canadians' Charter rights.

1.2. The Cases with Timelines

Event timelines and background information of Dr. Hassan Diab and Mr. Ahmed Khadr are presented below. The key documents regarding their trial, parliamentary debate transcripts, inquiry reports, and court excerpts can be found in the Appendix as Document 1-4.

1.3. Dr. Hassan Diab

The opening paragraph of the Independent Review of the Extradition of Dr. Diab' case, prepared by Justice Murray D. Segal describes Dr. Hassan's profile in the following way:
Dr. Hassan Diab, a 60-year-old Canadian citizen with no criminal record, was living in the Ottawa area and teaching at two Ottawa-area universities when he was extradited to France on November 14, 2014, to face multiple charges of murder, attempted murder and destruction of property. At the time he was surrendered to France, Dr. Diab was married with one young child and a second on the way. The charges arose from an antisemitic terrorist attack in France on October 3, 1980. A bomb exploded outside a synagogue on Rue Copernic in the city of Paris, killing four people, injuring more than 40 others, and causing substantial damage to buildings in the area [5].

The RCMP arrested Dr. Diab on 13 November 2008 at the request of French authorities. On 1 April 2009, Dr. Diab was let out on bail with conditions such as always wearing a GPS monitoring device, for which he paid approximately $2,000 per month.

On 26 June 2009, the Ontario Court of Appeal upheld Dr. Diab's bail, yet on 29 July 2009, Carleton University terminated his teaching contract. This was criticized by Carleton University faculty, labour unions, and the National Post on the ground of the right to the presumption of innocence. On 18 December 2009, the hearing dates (scheduled for 4 January 2010) collapsed after the Crown Prosecutor sought a lengthy adjournment, continuing to 8 February 2010, allowing France and the Crown more time to consider defence evidence (i.e. handwriting reports). On 17 May 2010, once such reports had been discredited, France withdrew them, causing further delay.

Between August and December 2010, the Court heard from legal and handwriting experts based on the abuse of process application filed by Dr. Diab's defence team, detailing how French investigators and the Crown Prosecutor continued to rely on flawed handwriting evidence. Nevertheless, on 18 February 2011, the judge admitted French handwriting analysis as evidence, despite finding it "very problematic," "very confusing" and with "suspect conclusions" [12].

Having denied a request to allow additional handwriting expert evidence on 26 May 2011, the judge signed the committal order for Dr. Diab's extradition to France on 6 June 2011, followed by Justice Minister Rob Nicholson's surrender order on 5 April 2012. In the aftermath, an appeal of the committal and surrender orders was filed on 5 February 2013 with the Ontario Court of Appeal, and on 15 May 2014, the Court upheld Dr. Diab's extradition. Immediately, a leave to appeal was filed in the Supreme Court of Canada and was dismissed on 13 November 2014. Dr. Diab was extradited to France in the morning of 14 November 2014 [13].

After 18 months in pre-trial detention in France, Dr. Diab was released on bail on 14 May 2016, and on 28 July 2017, a notification of the end of his investigations was issued. Finally, on 12 January 2018, the judges dismissed allegations and he was released from prison; he arrived in Canada as a free man on 15 January 2018. During the process, the French upper court overturned his release order eight times.

1.4. Abdullah Khadr

The US requested the extradition of Abdullah Khadr to stand trial in Boston, Massachusetts, on terrorism-related charges on 9 February 2006 based on the allegation that he procured various munitions and explosive components for al-Qaeda's use in Afghanistan [14].

As the Northern Alliances took over Afghanistan from the Taliban in 2002, the US declared bounty on selected al-Qaeda affiliates [15]. Accordingly, by 2004, Khadr had a bounty of half a million USD on him; he was eventually arrested in Pakistan on 15 October 2004 and interrogated by US and Pakistani intelligence agencies (ISI) until his return to Canada on 2 December 2005. However, he was arrested in Scarborough, Ontario, on 17 December 2005 for allegedly acting as an al-Qaeda gunrunner and supplying material to make land mines. In October 2009, Khadr's extradition hearing commenced. Final arguments regarding his extradition were made on 7-9 April

2010 and the Ontario Superior Court Justice Christopher Speyer denied the extradition request on 4 August 2010, after four-and-a-half years of pre-extradition custody. In November 2011, the Supreme Court of Canada rejected an appeal by the federal government for extradition of Khadr to the USA. In his 62-page-long verdict, Justice Speyer criticized the US bounty on Khadr and the abuse he suffered in Pakistan. The Justice explicitly mentioned in his ruling that "the rule of law must prevail over intelligence objectives Khadr was never charged in Canada for terrorism so far [16].

1.5. Geo-political Context and Extradition

Both cases emerged between 2005 to 2014, during the height of the Global War on Terrorism (GWoT). These were not only widely shared and emotionally argued in the public and media domains but were picked up by social justice activists. In the case of Dr. Diab, doubts about the French authority's ability to gather credible handwriting evidence that would have proved beyond a reasonable doubt his presence in France in 1980 surfaced. As the case was taken up by the Canadian legal system, similar skepticism was again expressed in clear terms by Dr. Diab's defence team. Despite the skepticism, the federal Justice department through the International Assistance Group (IAG) actively collaborated with the French authority to make this a criminal case [17]. This active collaboration included consistent pleas to the French authority to produce more proofs and arranging to procrastinate the hearing in Canada. IAG's efforts raise at least an ethical question: Why did Canadian authority go above and beyond in surrendering a Canadian citizen to France on dubious ground? Even though Justice Segal's report cleared the IAG's action later, he observed, "Counsel on both sides represented their respective clients with a great deal of passion and belief in their causes. That passion at times escalated markedly. France's case against Dr. Diab was circumstantial [5]. Therefore, if the IAG counsels were professionals and realized the flimsy ground that France was making to seek extradition in the first place, why they were so passionate about this case? Even at the extent of "withholding exculpatory evidence and making false representations to the extradition judge" (ibid, p, 8)? Justice Sehgal confirmed in his report that France's case against Dr. Diab was circumstantial as it was based on five pieces of evidence of which "a handwriting comparison analysis prepared by a French expert that concluded Hassan Diab was the likely author of a small number of words the fictitious Panadriyu had printed on a hotel registration card [5]. In fact, France presented analysis of two handwriting experts who claimed there was a link between Diab's writing and that of the Paris bomber; however, later on, four foreign handwriting experts submitted opposing reports, which were presented by Dr. Diab's defense team. Therefore, the methods and conclusions of the French experts were dubious especially when it was revealed that some of handwriting samples that French experts produced were not even Diab's; it was from his ex-wife [18]. However, Justice Segal, concluded that the "DOJ counsel acted properly in vigorously advancing France's case. We would expect French authorities to do the same when Canada makes an extradition request" (ibid, p, 8). Such reciprocation has never been reported for Canada, albeit extradition requests from Canada to others are rare.

Similarly, Mr. Abdullah Khadr's case emerged between 2010 and 2011 when GWoT was in its zenith. Despite Canadian governments arguments such as "…Canada's ability to comply with its international obligations could be compromised if the decision staying the extradition of Khadr was allowed to stand… it was wrong to prevent an "admitted" terrorist from facing trial in the U.S… This case raises issues of national importance that require consideration by this court… Principles of fundamental justice should not be used to impose the technicalities of our criminal law on a foreign partner", the Supreme Court of Canada took a firm stance and did not want to "reward the Americans" because of their "gross misconduct" (i.e., where the US arranged and prolonged Khadr's detention in Pakistan) [19]. Canada already presumed Mr. Khadr's guilt despite overwhelming evidence suggest that he might have been coerced into confession by joint US-Canada interrogation teams. Subsequently, the Supreme court of Canada considered the 'gross misconduct' of counter-terrorism regime within which Mr. Khadr was treated unjustly.

1.6. The Weakness of Canadian Extradition System

Considering the two cases, suffice it to say, the Canadian extradition system too heavily favours prompt compliance with its extradition partners over the protection of the rights of its citizens sought for extradition. The current system should only extradite people to stand trial, not to face investigation, though in the case of Dr. Diab, France spent a lot of time investigating the case while keeping him in prison, which is a gross violation of human rights. In particular, Dr. Diab's case exemplifies the low evidentiary threshold the extradition requesting state has to meet. Without any sworn evidence or affidavit and only based on the submitted record of the case, which, under Canadian law, was deemed reliable to extradite him. Thus, the record carried enormous weight in the hearing process and the defence was unable to call witnesses or submit contradictory evidence; so, the deck was stacked against Dr. Diab. Although the proponents of the system argue that this is done to ensure the extradition process take place quickly and does not replace a full trial. But as transpired, in Dr. Diab's case, a man with an alibi was extradited on weak evidence after four years of extradition trial in Canada and spent years in a notorious French prison. Despite the extraditing judge's expressed doubt to secure a conviction, Dr. Diab was still imprisoned without ever being formally charged or going to trial. In view of this, it is fair to say that the application of 'rule of law' which is expected to expand the courts' constitutional review authority to ensure constitutional standards are met for every Canadians without discrimination, all citizens are treated equally, and none could exercise illegal power to influence a due process, have not been applied in Dr. Diab's case.

According to Alex Neve, Secretary General of Amnesty International Canada, there is no way to figure out why "those [Canadian] 'laws, practices and policies' fail to protect Hassan Diab from years of agonizing human rights violations" [20]. Dr. Diab's case has caused a chilling effect in the minds of visible

minorities in Canada as they realize that anyone can be extradited from Canada without proper evidence if they are sought for national security matter by any of the extradition partners. Subsequently, whether an extradition request has merit or not, in current practice a person is automatically judged as guilty and suffers from all the legal consequences and an irreparable damage to his or her dignity.

Those who support the current system say that "Dr. Diab's case does not reveal any deficiencies in the extradition system. He was legally extradited having been afforded all appropriate procedural protections. The fact that he was not convicted in France does not render the extradition process flawed" [5]. This line of argument is fraught because according to the current system, "procedural protections" only mean the case should be heard in a superior court and irrespective of the merit of the case, a person must be surrendered (see Justice Maranger, prosecuting judges verdict) [21]. Thus, it begs question: If that is the rule (not the exception) then how a person's Charter rights and fundamental freedoms are protected? In this regard, a key 2006 Canadian Supreme Court ruling must be recalled. That ruling, known as "Ferras," essentially advised provincial courts to stop rubber-stamping extradition requests and start weighing evidence from countries requesting the extradition of Canadian citizens, and stipulated that if the evidence is unreliable, then a request can be turned down [23]. In the same ruling, it was also suggested that "if the evidence is 'so unreliable that the judge would conclude that it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal'." Further, the International Civil Liberty Monitoring Group (ICLMG) noted that Canada's extradition partners have different human rights standards when it comes to prosecuting suspected terrorism cases. In Dr, Diab's case, France submitted "unsourced intelligence" as evidence, whose veracity could not be ascertained because it might have been obtained through torture. While these sources are inadmissible in the Canadian criminal justice system, France originally included it in the documents since it was allowable in French courts [24]. As gleaned from the concept of 'rule of law' that can be viewed as a system composed of laws, institutions, norms, and community commitment that delivers, accountability, just law, open government, and accessible and impartial justice it begs question, what failed Dr. Diab in getting justice in Canada? Especially, when it comes to the question of 'just law' which demands, "The law is clear, publicized, and stable and is applied evenly [25]. It ensures human rights as well as contract and property rights" (ibid).

About the extradition disclosure rules aimed at making the system transparent, the requesting state does not have to submit all evidence and does not have to share any information that may be exculpatory or point to innocence; it only needs to establish a *prima facie* case and unless the requesting state can show it – that is, there is some evidence which, if believed, can establish the person sought committed the alleged offence – the person should not be extradited [5]. In this case, IAG sought to gather additional evidence such as fingerprints to help strengthen France's extradition request. But when the evidence turned out to not help France -- and in fact could have aided Dr. Diab -- it was never shared with Diab's legal team or the judge. Although it was within the rules, but it again proves how the rules were stacked against Diab. It alludes to the 'state complicity' in this case. Take for example, the finding of the independent lawyer about IAG's unusual involvement in this case from the following paragraph

At the extradition hearing, the requesting state is represented by counsel for theAttorney General. These lawyers work within the Federal Department of Justice. *Unusually*, [emphasis added] in Dr. Diab's case, counsel within the IAG took on this role. Typically, IAG counsel act in an advisory capacity and DOJ counsel in the various regional offices across Canada, who specialize in litigation and who are not members of the IAG, represent the requesting state at the extradition hearing. IAG counsel took on a litigation role in Dr. Diab's case because of their familiarity with the file, their fluency in French, their litigation experience and because the extradition hearing took place in Ottawa, where the IAG is located (ibid, p, 21).

According to David Cochrane (the journalist who covered the case extensively), "one prominent extradition lawyer in British Columbia estimated that 90% of all extradition requests are successful. If any other part of the legal system was producing the same outcome 9 times out of 10, it would likely be reviewed". Here the relevant question is, why legal part of the extradition regime is beyond review?

Although Justice Segal claims that IAG usually does not involve in extradition cases rather this group is mandated particularly to help "Canadian and foreign police and prosecutors to fight crime at an international level" providing mutual legal assistance [17]. Nonetheless, according to the Justice Ministry, the IAG, assists the Minister of Justice on the matters of *Extradition Act* and the *Mutual Legal Assistance in Criminal Matters Act.* "The IAG reviews and coordinates all extradition and mutual legal assistance requests made either by or to Canada and is known as the "Central Authority" for Canada in these areas of international cooperation (ibid)." Thus, it is understandable that in the existing extradition regime, the Minister of Justice and Attorney General (AG), may authorize the IAG to proceed with an extradition hearing. And for the most part, the IAG guides the extradition process through the court hearing process and deals with appeals. The Minister only comes into it at the very end when all legal avenues have been exhausted and as the extradition subject makes an appeal to the Minister. This is how if not all, eventually many extradition decisions can be linked to existing geo-political consideration such as GWoT (in this case) or inter-state conflict (take for example the much-discussed extradition case of Huawei's chief financial officer Meng Wang Zhou). The latter went to trial two years ago and the hearing was completed in August 2021 only. However, it awaits the decision of Canadian Associate Chief Justice Heather Holmes for surrender which is expected to take months [26]. Further, in the current system, "either party may appeal a decision on committal to the provincial Court of Appeal on grounds similar to those governing appeals against conviction in the Criminal

Code", yet, "Courts have held that special deference is owed to the Minister's decision to surrender, which is largely political given the Minister's "particular expertise" in the area" [27]. In this case, the Minister of justice accepted the reassurances of various judges and government lawyers that Diab would not languish in a French prison, which was proved incorrect. Therefore, one cannot but wonder if a Conservative pro-Israel Canadian government would ever block the extradition of a Muslim suspected of bombing a Jewish synagogue in the capital city of a G7 ally. In support of this hypothesis, one commentator surmises:

From the outset, Diab's case was clearly a political one. The continuation and eventual dropping of this legal vendetta would deeply rely on the whims, moods, and political wills of both Canadian and French authorities.

When Diab was first arrested in Canada in 2008, it was under the Stephen Harper government. It was an era that today we can easily qualify without hesitation as an unfriendly era for Arabs and Muslims.

Hassan Diab was not only an Arab-Muslim Canadian but also a terrorism suspect. Let's not forget that it was the same Stephen Harper who introduced Bill-51, a bill that later became Canada's anti-terror legislation 2.0.

The law gave expanded powers to police and to the Canadian Security Intelligence Service (CSIS). For years, the Muslim community felt besieged by these new powers. The atmosphere was not favourable to challenging a narrative that linked terrorism to Islam [28].

1.7. Judicial Intervention and Extradition

The Canadian government lost its battle to extradite Mr. Khadr in 2010 because the court intervened to protect his human rights in light of the mistreatment, he had endured under the joint collaboration team composed of US, Pakistani (ISI), and Canadian intelligence officials from 2004. Additionally, Mr. Khadr could be prosecuted in Canada under the 2001 Anti-Terrorism Act for acts of terrorism, which until now has not been done [29]. Consider what the Ontario Court of Appeal said in its judgement by highlighting the fact that government's request for Mr. Khadr's extradition was based on an "emotive argument that because of what the extradition judge did, an admitted terrorist collaborator is allowed to walk free"; however, his terror act allegations was "unfounded" and because of the Court of Appeal took the seriousness of the abuse in cognizance. This case is testimony to the Canadian legal system's protection of fundamental human rights and instruction of government review on the relationship between Canada and its extradition treaty partners, in reference to "interrogations, cooperation with countries with poor human rights records and the tension between intelligence-collection and criminal prosecution" (ibid).

Three questions that were raised earlier in the article should be answered now. How can one system produce very different outcomes? Although one can argue that the verdicts were based on the merits of the cases, thus the courts justifiably decided to agree to extradite request in one while not in the other's; the critical point is, in both the cases, the Canadian government played a crucial role in support of extradition requests. The government's complicity in these cases was palpable and inexplicable. In this regard, when the French Cour de Cassation's ruled in May 2021that Dr. Hassan must stand trial again in France, his lawyer, Donald Bayne, argued that "The travesty of justice continues despite clear evidence of Hassan's innocence… This shows how political pressure trumps justice. We call upon PM Trudeau to put an end to this miscarriage of justice" [30]. In addition, due to the 'low threshold for extradition cases,' the extradition judge might have agreed to extradite Dr. Diab. At the same time, the court took into cognizance of the US counter-terror officials' human rights abuse for the latter in denying the extradition request.

Who should be the ideal arbitrator in an extradition process—a Judge or a Minister? And should the threshold for extradition requests be higher? In the current extradition regime, the Minister reserves the right to surrender a person to the requesting state finally. However, we argue that when life, liberty, and reputation of a Canadian citizen are under threat; the final arbitrator should be the judiciary; hence, the onus must be shifted from the political regime in power to the legal system. It is contended by legal scholars and activists in Canada that the threshold of a request should be revisited so that a requesting state must be obliged to submit all of its evidence in support of its demands, so that an accused has a fair chance to defend his/her case. Consider the former Amnesty International Canada's Alex Neve's comment in this perspective, "This has been a case that's been 'before the courts,' either in Canada or France, for nearly 14 years now… and the courts have failed to deliver justice at every single turn through two levels of courts in Canada and through three levels of court now in France. And there comes a point where enough is enough and it's human rights and justice that have to take precedence." [31]. A law professor also expressed her, "… serious concern about lowering the threshold of evidence against persons sought that was embodied in the Act [i.e., extradition act], and the potential that this dropping of the evidence bar involved for potential human rights violations against persons sought [32].

How a citizen's rights are protected when it comes to the geo-politics or national security matter (e.g., counter terrorism)? As it transpired, Dr. Diab's legal case has been tainted by politics both in Canada and France. No doubt, the 1980 synagogue attack was France's first high profile antisemitic incident in 35 years and a series of terror acts in France in the near past pushed the country to a state of 'paranoid suspicion of all Muslims' where "civil human rights have been undermined in the aim of investigating terrorist acts" [33]. Take for example, following Dr. Diab's deportation to France, his lawyer, Bayne claims that certain media sources depicted Diab as guilty, "some of the major French media had stated that 'the terrorist' had arrived on French soil…there is such a pro-prosecution climate when it comes to accused terrorism. It's almost as if the game's customary rules have been suspended" (ibid). Prevailing geo-political environment influences extradition decision as seen

from the above-mentioned analysis and arguments consolidated from various experts and scholars. Nonetheless, we should not be oblivious of the fact that a person being sought on terrorism case must face the ordeal of Canadian legal system but also, he/she is subjected to social stigma and loss of reputation and livelihood at a grand scale. Thus, extradition requests must be considered holistically before committing to the requesting state.

In addition, the Federal justice website, where a summary of extradition cases from 2012-18 from the US is provided without any explanations, leaving us in the dark about how many similar 'meritless cases' accused of terrorism were surrendered. Some extradition requests might also have potential to impact inter-state relationship, as revealed in the ongoing extradition case of Ms. Meng Wanzhou (unlike Dr. Diab and Mr. Khadr, she is a Canadian resident, not a citizen, however, she enjoys protection under Canadian law and the Canadian Charter of Rights and Freedoms). Here, the Canadian extradition system once again faced a challenge that has caused diplomatic tension and led to a trade war with China. In Canada, it is expected that the priority of the state should be to protect its citizens and residents, as echoed by the immediate past Minister of Justice and Attorney General Jody Wilson-Raybould. In reflecting upon Meng's case, she said "Canada's extradition process protects the rights of the person sought by ensuring that extradition will not be granted if, among other things, it is contrary to the Charter of Rights and Freedoms, including the principles of fundamental justice."

1.8. Recommendations for Reform

After the release of Segal's report, demand for a public inquiry about Dr. Diab's case has grown substantially in Canada. Nonetheless, drawing insights from the cases and analyses, a concrete and legislative change needs to be brought in to reform the 1999 Extradition Act. The recommendations are:

First, Canadian judicial standards (especially when admitting evidence) must be maintained when hearing an extradition case. The onus should be put on to the extradition requesting states to complete an investigation with due diligence and thereafter submit a request (although these aspects could be gleaned from the extradition agreements, yet these are often not followed). Canada should only verify, but not pursue, any requesting authority for credible evidence and only then surrender a Canadian. There should be a stricter testing of the evidence submitted by the extradition requesting state. It should be sworn evidence and verified; it should also be complete. There should also be a broader disclosure of evidence so the defence can make stronger arguments.

Further, the cloak of secrecy for the sake of national security and state-to-state confidentiality must not override the human rights of a Canadian citizen.

Second, an arrest should not be made under the anti-terrorism laws that allows for the ongoing and indefinite detention of individuals while they are being investigated; such an approach pre-emptively establishes a person's guilt over innocence and should be considered as a human rights violation. In this regard, bi-lateral agreements need to be reviewed and amended.

Third, as in the current system, it is meaningless if extradition judges are powerless to deny extradition in cases that appear to be weak or unlikely to succeed at trial. The Canadian judiciary should be the lead organ that decides on extradition; the executive branch of the government should rather "rubber stamp" the court's decision. This strategy, if taken, would absolve Canada from geopolitical tangling and resulting biases. Nevertheless, the Canadian Supreme Court is the last resort to intervene in selected cases based on national interest. Record shows, extradition cases are seldom heard at the Supreme Court—it receives about a dozen extradition appeals each year and has only agreed to hear one in the past seven years. However, the current act stipulates that the Supreme Court will only hear a case if it warrants public importance, which is a subjective matter that depends on various socio-political-international factors.

As a way of an update, in January 2020, Dr. Diab and family sued the Canadian federal government for $90m for failed terrorism charge that resulted in years of imprisonment and reputation damage [34]. In 2021, a French lower court has upheld a decision directing Dr Diab to stand trial again [35]. In April 2023, a French court has found Dr Diab guilty in absentia that has opened the path of another round of extradition resulting his life imprisonment.

2. Conclusion

In 2018, Canadian Prime Minister Justin Trudeau said about Dr. Diab's case, "This is something that, obviously, it's an extremely difficult situation to go through for himself, for his family, and that's why we've asked for an independent external review to look into exactly how this happened and make sure that it never happens again" [36]. However, an independent inquiry led by Justice Sehgal cleared any wrongdoing by IAG staffs, which was vigorously rejected by Dr Diab and his defence team who dubbed it as a measure of "damage control" and "whitewash" attempt by the government. This chapter compared two high profile cases tried under the 1999 Extradition Act, yielding vastly different results. It was revealed that while Dr. Diab was extradited to France following a lengthy extradition process in Canada, he was eventually released without any charge. This case pointed out several loopholes in the current Extradition system as well as Canada-France bi-lateral agreement that need to be reformed to secure the rights and freedoms of Canadians. While in the case of Mr. Khadr, the Canadian judiciary intervened and rejected the US request on the ground of human rights violation of the accused. This comparison along with primary sources would reinvigorate the ongoing efforts to reform the Act [37].

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