Do migrants suspected of terrorism deserve human dignity? The borderline between the rule of law and war on terrorism

Abstract

In a case before a Federal Court of Canada, Justice Snider stated that "it is difficult to imagine how discriminating against a non-citizen because of his association with a terrorist organization violates that person's human dignity."[1] This case was against a permanent resident of Canada who is found inadmissible to Canada on security grounds for being a member of a terrorist organization, namely, Popular Front for the Liberation of Palestine. On the other hand, the Canadian government's current strategy to deal with returning suspected jihadis of ISIS are enforcement, surveillance and deprogramming. According to Public Safety Canada, approximately 60 out of 190 Canadians suspected of engaging terrorism abroad returned to Canada in 2017. In response to their return, the prime minister of Canada, Justin Trudeau said "We are going to monitor them. We are also there to help them to let go of that terrorist ideology." Why are migrants suspected of terrorism undeserving of human dignity whilst citizens suspected of the same acts receive the state's help to "let go of that terrorist ideology"? This paper argues that the bond of citizenship is the only reason why suspected Canadian jihadis are considered for rehabilitation regardless of how grave their suspected crimes might be abroad. By contrast, a non-citizen who is suspected of similar crimes would be detained, be subjected to security regimen including inadmissibility proceedings and probably, be deported as the last resort. However, states are committed to apply fundamental rights equally to persons under their jurisdiction due to their international obligations. This paper concludes that the current interpretation and implementation of law in Canada discriminate against non-citizens who are suspected of serious criminality compare to citizens who are suspected of similar crimes.

1. What is crimmigration?

The criminalization of migration involves both criminal and administrative law in the areas of borders, immigration and asylum. Stumpf describes the criminalization of migration law as the convergence of two areas in both substance and procedure forming identical systems in which migration law and criminal justice system are nominally distinct.[2] The emerging area of law called 'crimmigration' confers "the letter and practice of laws and policies" at the

[1] Al Yamani v. Canada (Minister of Citizenship and Immigration) (2006), 149 C.R.R. (2d) 340; 58 Imm. L.R. (3d) 181 (F.C.)

[2] Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power"(2006) 56:2 American University Law Review. [Stumpf]

crossroads of criminal law and migration law.[3] Crimmigration further questions how law enforcement agencies and other authorities handle the "threat" of possible perpetrators of serious international crimes including suspected war criminals, *génocidaires* and terrorists moving across borders.[4] It is a process whereby criminal justice principles are embodied into immigration law, which had been originally perceived as a civil or administrative aspect of State legislation.[5] Valsamis Mitsilegas explains the threefold process: crimmigration governance occurs (i) through the adoption of substantive criminal law, (ii) through referral to conventional criminal law enforcement techniques such as surveillance and detention, and (iii) through "the development of mechanisms of prevention and pre-emption."[6] The criminalization of migration law means the adoption of criminal categories, processes and techniques into the governance of migration.[7] These categories, processes and techniques include the prosecution of immigration violations, the use of criminal sanctions to deter citizens from assisting foreigners to enter a host state, the deportation of a foreigner due to his/her past conviction, the detention and prosecution of asylum seekers entering a host state with false documents, the heightening of cooperation between state law enforcement offices and immigration departments.[8] Criminal law enforcement strategies, including "the use of criminal databases, increased use of investigative tools, arrests, seizures, prosecutorial approaches", are currently used in immigration enforcement strategies.[9] As an example, the *2001* Act (Immigration and

[3] Joke Reijven, Joris van Wijk "Alleged perpetrators of serious crimes applying for asylum in the Netherlands: Confidentiality, the interests of justice and security" (2015) 1:15 Criminal Crim Justice at 2. [Reijven&Wijk]
[4] *Ibid.*
[5] Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms (2007) 64:2 WASH. & LEE L. REV. 469.[Legomsky]
[6] Valsamis Mitsilegas, "The Criminalisation of Migration in Europe Challenges for Human Rights and the Rule of Law" (Springer Briefs in Law, 2015) at 2. Please also see Stumpf, *supra* note 33, "The convergence of immigration and criminal law is three-folded. First, the substance of both areas "increasingly overlaps". Second, "immigration enforcement has come to resemble criminal law enforcement", and finally, "the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure."
[7] Teresa A. Miller, "Citizenship & Severity: Recent Immigration Reforms and The New Penology" (2003) 17 Geo. Immigr. L.J. 611 at 4. [Miller]
[8] *Ibid* at 3-4.
[9] Stumpf, *supra* note 1

Refugee Protection Act (S.C. 2001, c. 27) allows the Canadian government to use extensive powers to detain migrants suspected of being a security threat.[10]

1.1. Stumpf's membership theory: the similarities between criminal and immigration law

For Stumpf, the convergence of migration and criminal law is "odd and oddly unremarkable".[11] It is odds because criminal law aims to prevent and redress harm to society whilst immigration law regulates acceptance and refusal of individuals at the borders and beyond. Despite of the dissimilarities on the surface, criminal and immigration law has one thing in common: regulating the relationship between the state and the individual. Migration law and criminal law have a similar function as both regulate membership into society; both create insiders and outsiders; both are designed to create distinct categories of people—innocent versus guilty, admitted versus excluded or, as some say, "legal" versus "illegal."[12] Although the outcomes of the two systems might differ, both systems govern who should be included and excluded from membership. Migration law excludes a person from membership by detaining and expelling s/he from national territories, whilst criminal law fulfills the same function by incarcerating.

Yet, immigration and criminal law regulate the acquisition and loss of membership in two different ways. In criminal law, the burden to prove that the defendant should lose its full membership from the society lies with the government. This pro-membership standpoint grants strong constitutional rights to criminal defendant including the presumption of innocence. When the state uses its power to punish, these rights protect all people "within the constitutional community against exclusion from society without a substantial justification."[13] On the other

[10] Geral E. Dirks, "Immigration Policy in Canada", *The Canadian Encyclopedia of Philosophy* (February 2006), Richard Foot (ed.), URL = <https://www.thecanadianencyclopedia.ca/en/article/immigration-policy#>
[11] Stumpf, *supra* note 1 at 379.
[12] Stumpf, *supra* note 1 at 380.
[13] Stumpf, *supra* note 1 at 400.

hand, immigration law presumes non-membership. As a rule, foreigners are considered inadmissible "unless they show they are 'clearly and beyond a doubt entitled to be admitted." The government's burden of proof in a criminal case is higher than in deportation cases — for American standards it is "clear and convincing evidence" rather than "beyond a reasonable doubt."[14] In Canada, mere suspicion may suffice to justify certain detentions and expulsions, while criminal conviction requires proof beyond a reasonable doubt. Thus, unlike foreigners, citizens have the highest level of constitutional protection.[15]

In criminal law, the membership theory reveals itself through two functions of the sovereign state: the authority to punish and to "express moral condemnation" as a primary response to crime. In immigration law, the powers of sovereign state appear in the state's large discretion to decide who to include and exclude membership into and from the society. As opposed to the rehabilitative method, which provides protection to the public by re-integrating the perpetrator into a community, a migrant, who violated the prescribed rules, is not integrated into society. For Stumpf, there is one thing in common: migration and criminal law both conduce to discriminate "certain people of color and members of lower socio-economic classes."[16] The sovereign state model categorizes ex-offenders and migrants as the "'outsiders' from whom citizens need protection".[17] Hence, the practices of the State that the membership theory analyses results in segregating a community, generally detectable by race and class.

Stumpf's membership theory implies that ex-offenders (citizens) and non-citizens are treated similarly by the sovereign state. The author determines that ex-offenders and migrants are both outsiders and hence, overlooks that an ex-offender is still a citizen, which draws the fundamental difference between him/her and a migrant. The difference lies at the fact that a citizen who is suspected of criminality -regardless of whether coming from an unprivileged

[14] Stumpf, *supra* note 1 at 400.
[15] Stumpf, *supra* note 1 at 400.
[16] Stumpf, *supra* note 1 at 405.
[17] Stumpf, *supra* note 1 at 412.

community-, has the protection of criminal law instruments due to its citizenship; whilst a migrant is subjected to mostly arbitrary crimmigration policies. These policies are detrimental to migrants because the incorporation of criminal justice model into immigration law occurred *asymmetrically*. Although Stumpf concedes that the burden of proof in deportation cases is lighter than that in a criminal case and that citizens have the highest level of constitutional protection, the author considers ex-offenders and migrants in the same category. In this sense, the author establishes two layers in applying the membership theory: a difference between citizen and migrant on one hand, and a similarity between ex-offender and migrant on the other hand. This approach is flawed because an ex-offender is a citizen enjoying the protection of citizenship, whilst a migrant is stripped of his/her liberty including a right to entry into the state.

1.1.2 The incorporation of the criminal justice model into immigration law occurred *asymmetrically*

Although viewing ex-offenders and immigrants in the same category is mostly inappropriate, the membership theory acknowledges the sovereignty claim: the migrant needs to justify why they should be admitted to a foreign land. In criminal law, the rights offered to the accused, including the presumption of innocence and a higher threshold for the burden of proof, underlie the individual liberty as the core of these rights. On the contrary, immigration law prioritizes the state discretion. This tension between individual freedom and state power fully resonates within the field of crimmigration. Criminal law protects the accused due to the prospect of loss of individual liberty whilst immigration law protects – first and foremost – the state's power by excluding any unwanted migrant from the territories, without requiring justification. One of the results of this tension between individual and state liberty is the asymmetric way of incorporating the criminal justice model into immigration law.[18] Principles embraced in criminal enforcement have been firmly incorporated into immigration law whilst

[18] Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms (2007) 64:2 WASH. & LEE L. REV. 469.[Legomsky]

"the procedural safeguards at the core of criminal adjudication have been consciously rejected. Adjudication has followed the civil regulatory model." [19] In a sense, immigration law has replaced the traditional function of criminal law. Today, foreigners who are suspected of terrorism are either detained or deported. Deportation means the removal of a non-citizen upon the administrative decision that s/he is no longer authorized to remain in the foreign state.[20] Daniel Kanstroom asserts that the functions of criminal punishment: incapacitation, deterrence and retribution are achieved through the deportation of some permanent residents in the U.S.[21] While criminal justice system offers stronger substantive and procedural barriers to a criminal conviction, deportation does not entail similar obstacles, which allow authorities to launch measures based on "citizenship status and ethnicity."[22]

As an example, Canada Border Service Agency's (CBSA) Border Watch program – Wanted by the CBSA – list is a compelling immigration penalty. The list contains a photo of each wanted individual together with their personal information such as their gender, date and place of birth, identifying features, and the reason why they wanted for deportation.[23] The most-wanted list is an immigration enforcement strategy but also presents itself "as a key technology of Canadian crime control, national security, and public safety."[24] Furthermore, the list encompasses the elements of criminal justice punishment by valuing the expedition, the detention and deportation of foreigners considered to be security threats. [25]

Politicians have long justified and supported the use of these immigration penalties. As an example, then Minister Jason Kenney normalized and advocated the adoption of criminal

[19] Legomsky, *supra* note 17.
[20] Teresa A. Miller, "Citizenship & Severity: Recent Immigration Reforms and The New Penology" (2003) 17 Geo. Immigr. L.J. 611 at 11. [Miller]
[21] Daniel Kanstroom, "Deportation, Social Control, and Punishment" (2000) 113 HARV. L. REV. 1889, 1891.
[22] Stumpf, *supra* note 1.
[23] Anna Pratt, "Wanted by the Canada Border Agency" in Deborah Brock, Amanda Glasbeek, Carmela Murdocca eds. *Criminalization, Representation, Regulation: Thinking Differently About Crime (*Ontario, New York, University of Toronto Press: 2014) at 285.
[24] Ibid at 294.
[25] *Ibid.*

enforcement strategies in immigration law. As a response to Amnesty International's open letter, then Minister Kenney "dismissed all concerns about human rights and international justice as 'poppycock' and justified the prioritizing of administrative deportation rather than criminal prosecution by referencing the 'preeminent goal' of 'defending Canada and upholding the integrity of our immigration system.'…guided by 'the common sense of the people and the law" who both want war criminals removed from Canada'.[26] Likewise, then Toronto Mayor Rob Ford offered that the Canadian governments "should use Canada's federal immigration laws to ban individuals convicted of guns crimes from the City of Toronto."[27]

Lucia Zedner questions why states have shifted away from "ordinary principles of criminalization" in the area of immigration. For him, the bond of citizenship "provides a licence for the standards applied to non-citizens to be reduced, compromised, or dispensed with altogether."[28] In a democratic society, citizens *de jure* "share the privileges of a fundamental right to be presumed (p.52) free from harmful intentions; they enjoy common authorship, through an elected legislature, of the criminal law; and they benefit from the security of due process protections from unwarranted state interference in their lives."[29] As opposed to citizen, the non-citizen is a subject of distrust, only entitled to lower protections. Perhaps the best example for this situation is the rehabilitation program that is implemented by the Canadian government for the return of suspected Canadian jihadis.[30] The bond of citizenship is the reason why returning Canadian jihadis are considered for rehabilitation because they are considered to be members of the Canadian society, regardless of how grave their crimes might be in armed conflicts far from home. By contrast, a non-citizen who is suspected of similar crimes would

[26] *Ibid* at 308.
[27] *Ibid* at 295.
[28] Lucia Zedner, "Is the Criminal Law Only for Citizens ? A Problem at the Borders of Punishment" in Katja Franko Aas & Mary Bosworth eds. The Borders of Punishment: Migration, Citizenship, and Social Exclusion (Oxford University Press: 2003) at 11. [Zedner]
[29] Ibid.
[30] Hicham Tiflati, CBC, "Radicalization to Rehabilitation: How does Canada prepare for ISIS returnees?" online at: https://www.cbc.ca/cbcdocspov/features/radicalization-to-rehabilitation-how-does-canada-prepare-for-isis-returnees

be detained, be subjected to a security regimen including security certificates and inadmissibility proceedings, and probably be deported.

Today, states increasingly resort to administrative or hybrid administrative and criminal channels as these proceedings can bypass the strict procedural and evidentiary conditions of the criminal proceeding.[31] Administrative proceedings lacking the safeguards of criminal procedures can result in burdens and fines as grave as punishment[32]; yet, are preferable by states. The criminal law also has a power-restricting function during the "pretrial hearings on motions, the trial, appeal and the writ of habeas corpus" assessing the acts of officials enforcing the criminal proceeding. [33] Lacking the above, administrative, civil or hybrid processes deprived of a power-restricting function, has no or limited space to evaluate the actions of administrative officials.

2. States fail to observe the principle of equality and non-discrimination in the field of crimmigration

So far, this section discussed similarities between criminal and immigration law as well as the ways in which crimmigration policies have asymmetrically incorporated criminal law strategies. We also demonstrated that the bond of citizenship is the reason why citizens who are suspected of serious criminality receive the protection of state's criminal law safeguards whilst migrants suspected of almost identical crimes are subjected to administrative law standards with lesser protections. This point takes us to the second challenge that crimmigration poses to states: to what extent can states observe their human rights obligations while enforcing criminal law

[31] Zedner, supra note 27.
[32] *Ibid.*
[33] Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice" (1960) 69:4, Yale Law Journal at 544.

proceedings and categories within an administrative field? The core of this challenge lies in the implementation of the right to non-discrimination.[34]

The concept of equality has been discussed since early history. Aristotle famously declared that *things that are alike should be treated alike.*[35] We also know that not all differential treatments are unjust.[36] Formal equality encompasses an Aristotelian idea that same or similar things "should be treated in the same or similar ways", whereas substantive equality involves the notion that considering that some persons are disadvantaged in the society due to barriers and subtle arrangements causing inequality, they should be treated differently due to their disadvantaged position.[37]

In a legal sphere, states are committed to apply fundamental rights equally to persons under their jurisdiction due to their international obligations. This situation causes tension between exclusionary and discretionary nature of crimmigration polices and cosmopolitan and universal nature of fundamental human rights. Article 1 of the UDHR highlights that all persons are equal in dignity and rights. Specifically, the International Covenant on Civil and Political Rights (ICCPR) set forth that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. (Art. 7) The law prohibits any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground including national or social origin, birth or other status. (Art 26) All people are equal before the courts and tribunals. (Art 14) As put forward by the Inter-American Court, states' obligation to respect and guarantee human rights are directly connected to the principle of equality and non-discrimination. When states violate their obligation to respect and guarantee human rights, due

[34] Elspeth Guilt, "Criminalisation of Migration in Europe" (2010) Council of Europe Commissioner for Human Rights
[35] Aristotle, "Ethica Nicomachea" JL Ackrill and JO Urmson (eds), W Ross (tr) (Oxford University Press, 1980) 112–17, 1131a–31b.
[36] Kasper Lippert-Rasmussen, "Discrimination" in *The Oxford Handbook of Distributive Justice* Serena Olsaretti (ed.), (Oxford University Press, 2018)
[37] Jarlath Clifford, "Equality" in The Oxford Handbook of International Human Rights Law, Dinah Shelton (ed.) (Oxford University Press, 2013)

to any discriminatory treatment, they are internationally responsible.[38] According to the UN Human Rights Committee, Article 26 of the ICCPR is an autonomous right and "prohibits discrimination in law or in any field regulated and protected by public authorities."[39] In the European context, Article 14 of the European Convention on Human Rights (ECHR) guarantees the principle of non-discrimination in the enjoyment of convention rights. Likewise, Article 1 of the American Convention on Human Rights prohibits any discrimination on the basis of *inter alia* national origin, birth or other social condition. Similar to Article 7 and 14 of the ICCPR, Article 3 of the African Charter of Human and Peoples' Rights ensures that all individuals are equal before the law and entitled to equal protection of the law.

The principles of equality and non-discrimination are intertwined. The Inter-American Court of Human Rights noted that "when referring to equality before the law…this principle must be guaranteed with no discrimination… '[r]ecognizing equality before the law, [...] prohibits all discriminatory treatment.'"[40] For the Court, the concept of discrimination refers to "any exclusion, restriction or privilege" that is unobjective and unreasonable, and which "adversely affects human rights."[41]

In Canada, the right to equality is a constitutional right regulated under Art 15 (1) of the Canadian Charter of Rights and Freedom; *every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.* Looking at the legal structure and law, one might conclude that non-citizens and citizens are equal before the law and hence, no basis for crimmigration policies are justifiable. In other words, if all these international, regional and domestic instruments firmly protect the principle

[38] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), para. 85.
[39] United Nations Commission on Human Rights (UNCHR), 'General Comment No 18: Nondiscrimination' in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1), para 12.
[40] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), para. 83.
[41] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), para. 84.

of equality and non-discrimination, how could states still adopt discriminatory crimmigration rules?

Throughout history, there has always been exception to the principle of equality. For example, in ancient times, Aristotle did not find women and slaves as rational human beings and hence, treating them unjustly was entirely justifiable. In the 18th century's America, the Declaration of Independence of 1776 articulates that *all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and Pursuit of Happiness.* The term "all men" hereby refers to slave-owners, because the principle of equality was not endowed to African-American people; slavery was fully justifiable in 1776. Likewise, the laws regulating apartheid in South Africa in the 20th century were perfectly justified and impartially implemented.

History also unfolds that the courts of justices are not exempted from the logic of exception to the principle of equality and non-discrimination, regardless of how grave the consequences might be. For example, in the decision of *Dred Scott v. Sanford* (1857), Chief Justice Roger Taney on behalf of the U.S. Supreme Court infamously wrote that under the Declaration of Independence, blacks "had no rights which the white man was bound to respect, and that the negro [sic] might justly and lawfully be reduced to slavery for his benefit."[42] As history demonstrates, how courts enforce the principle of equality and interpret the terms of equality and discrimination are crucial to understand whose equality is undermined in the 21st century, similar to slavery and women's oppression in history.

2.1.1 Exceptions to the principle of equality and non-discrimination in the 21st century

Today, we observe that exceptions to the principle of equality and non-discrimination evolve around the terms of objective and reasonable justification, the principles prevailing in

[42] Dred Scott v. Sanford (1857), Page 60 U. S. 407, online at: https://supreme.justia.com/cases/federal/us/60/393/#tab-opinion-1964281

democratic societies, legitimate purpose, and human dignity. For example, for the ECtHR, the exception is an objective and reasonable justification.[43] When the differential treatment among "persons in relatively similar situations"[44] has no objective and reasonable justification, the principle of equality is violated. A justification to the general rule of non-discrimination is determined in relation to the aim and effects of the measure under review, which must comply with the principles prevailing in democratic societies.[45] For the Inter-American Court, the differential treatment is non-discriminatory if it has a legitimate purpose and does not result in "situations which are contrary to justice, to reason or to the nature of things."[46] If the differential treatment is based on "substantial factual differences"[47] and there is proportionality between these differences and just and reasonable aims of the legal rule under review, then the treatment is not discriminatory. The UN Human Rights Committee established that "[a] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 [of the ICCPR]."[48]

In Canada, equality right is subject to a general exception articulated under section 1 of the Charter: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In case section 15(1) of the Charter is violated, where discrimination amounts to a violation within the meaning of section 15(1), "any justification, any consideration of the reasonableness of the enactment; … any consideration of

[43] *Willis v. the United Kingdom*, Appl. No. 36042/97, [2002] ECHR 483.
[44] *Ibid* at para. 48.
[45] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits), Appl. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR 23 July 1968, page 31.
[46] Inter-American Court of Human Rights Advisory Opinion OC-4/84 of January 19, 1984 Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, para. 57.
[47] Inter-American Court of Human Rights Advisory Opinion OC-4/84 of January 19, 1984 Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, para. 57.
[48] F. H. Zwaan-de Vries v. the Netherlands, Communication No. 182/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987) at para. 13.

factors which could justify the discrimination and support the constitutionality of the impugned enactment"[49] would be assessed under section 1.

The first case in which the Supreme Court of Canada (SCC) interpreted section 15 is *Andrews v. Law Society of British Columbia* (1989) (henceforth *Andrews*). In *Andrews*, the SCC established that "discrimination was the imposition of a disadvantage (the imposition of a burden or the denial of a benefit) on an individual by reason of the individual's possession of a characteristic listed in section 15 or analogous to those listed in section 15."[50] Analogous grounds are all unchangeable personal characteristics of persons, or characteristics that are greatly difficult or costly to change.[51] In *Law v. Canada (Minister of Employment and Immigration)* (1999), the Court added a new criterion for a section 15 violation, namely, discriminatory treatment violating human dignity.[52]

In the case of *Withler v Canada* (2011), the SCC established that "the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries."[53] The key point is whether, considering all relevant factors, "the impugned measure perpetuates disadvantage or stereotypes the claimant group."[54]

In *Lavoie v. Canada* (2002), the SCC established that "[a] discriminatory distinction is one that violates human dignity".[55] In a case before a Federal Court of Canada, the Applicant argued that he is discriminated within the meaning of Article 15 (1) of the Charter, because the inadmissibility scheme in Canada proscribes associations and activities that are lawful for

[49] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.
[50] Peter W. Hogg, "What is Equality?: The Winding Course of Judicial Interpretation" (2005) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 29.
[51] *Ibid.*
[52] *Ibid.*
[53] *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [3].
[54] *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [3].
[55] *Lavoie* v Canada, 2002 SCC 23 at para. 2.

Canadians but are not lawful for non-citizens. [56] Justice Snider stated in her decision that "it is difficult to imagine how discriminating against a non-citizen because of his association with a terrorist organization violates that person's human dignity."[57] This case was against a permanent resident of Canada who is found inadmissible to Canada on security grounds for being a member of a terrorist organization, namely, Popular Front for the Liberation of Palestine. On the other hand, the Canadian government's current strategy to deal with returning suspected jihadis of ISIS are enforcement, surveillance and deprogramming. According to Public Safety Canada, approximately 60 out of 190 Canadians suspected of engaging terrorism abroad returned to Canada in 2017.[58] In response to their return, the Prime minister of Canada, Justin Trudeau said "We are going to monitor them. We are also there to help them to let go of that terrorist ideology."[59] Why are non-citizens suspected of terrorism undeserving of human dignity whilst citizens suspected of the same acts receive the state's help to "let go of that terrorist ideology"?

2.1.2. Discrimination based on a legal fiction: lack of citizenship

Does the legal conjuncture in Canada imply that the right to non-discrimination discriminate certain individuals? How can the general concept of discrimination inform crimmigration? Direct discrimination arises when persons "are subjected to detrimental differential treatment" due to "their membership in a particular social group(s)."[60] Stereotypes and biases associated with certain groups lies at the core of direct discrimination.[61] Systemic

[56] Al Yamani v. Canada (Minister of Citizenship and Immigration) (2006), 149 C.R.R. (2d) 340; 58 Imm. L.R. (3d) 181 (F.C.)
[57] Al Yamani v. Canada (Minister of Citizenship and Immigration) (2006), 149 C.R.R. (2d) 340; 58 Imm. L.R. (3d) 181 (F.C.)
[58] Public Safety Canada, 2017 Public Report on the Terrorist Threat to Canada, online at: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pblc-rprt-trrrst-thrt-cnd-2017/index-en.aspx
[59] Hicham Tiflati, CBC, "Radicalization to Rehabilitation: How does Canada prepare for ISIS returnees?" online at: https://www.cbc.ca/cbcdocspov/features/radicalization-to-rehabilitation-how-does-canada-prepare-for-isis-returnees
[60] Colleen Sheppard, "Inclusive Equality : The Relational Dimensions of Systemic Discrimination in Canada" MQUP, 2010. [Sheppard]
[61] *Ibid.*

discrimination refers to pervasive discrimination, attached to "structural inequalities, and institutionalized in social and organizational practices and procedures."[62] In the *Report of the Royal Commission on Equality in Employment* Judge Rosalie Silberman Abella noted that "the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society."[63]

Inequality arises through "a process of socially constructing differences in terms of a hierarchy of superiority and inferiority."[64] These differences are further bolstered by ideologies narrating that the features of "the dominant groups in society are 'normal' and superior."[65] In the field of crimmigration, a hierarchy of superiority and inferiority occurs when non-citizens who are members of terrorist organizations are considered undeserving of human dignity. In other words, a superior group here is referred to citizens who are members of terrorist organization and inferior group is non-citizens who are members of terrorist organization. As the legal conjuncture shows the bond of citizenship is sufficient to form a dominant group.

In *Andrews v. Law Society of British Columbia*, Justice McIntyre explains that *discrimination maybe described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limit access to opportunities, benefits, and advantages available to other members of society.*[66] In light of this decision, can access to procedural safeguards recognized in criminal law be considered opportunity, benefit, advantage available to other members of society? In the same decision, the SCC established that "non-citizens fall into an

[62] *Ibid.*
[63] Judge Rosalie Silberman Abella, "Report of the Commission on Equality in Employment" October 1984, page 9.
[64] Sheppard, *supra* note 59.
[65] Sheppard, *supra* note 59.
[66] Andrews *v.* Law Society of British Columbia, [1989] 1 S.C.R. 143 at 174.

analogous category to those specifically enumerated in s. 15." [67] Thus, can a barrier to procedural safeguards for non-citizens developed under crimmigration policies be considered as a distinction due to the lack of citizenship, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others?

As explained by Justice Wilson, constitutional equality aims at "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."[68] Analyzing a specific law or policy "within its larger historical and social context" is a key parameter to determine if the equality right is violated.[69] If non-citizens who are members of terrorist groups are undeserving of human dignity, what is the justification for this conclusion? If the justification is because of their criminality, then why do citizens belonging to the same category receive favorable treatment? Why do judges not consider larger social and historical context in examining crimmigration policies? Currently, there are no answers to these questions. In his influential book *Sapiens: A Brief History of Humankind*, Professor Yuval Harrari, wrote that the distinctions between "free persons and slaves, between whites and blacks, between rich and poor — are rooted in fictions."[70] Back in history many people supported an argument that slavery and hierarchy of persons are natural, far from being human invention. For Hammurabi, the gods established slavery.[71] For Aristotle, "slaves have a 'slavish nature' whereas free people have a 'free nature'."[72] Their position in society reflects "their innate nature."[73] In the 21st century, discriminating against migrants suspected or convicted of criminality is fully justifiable on the basis of a legal fiction, that is, the presence or absence of citizenship.

[67] Andrews *v.* Law Society of British Columbia, [1989] 1 S.C.R. 143, p. 152.
[68] R. v. Turpin, [1989] 1 SCR 1296 at 1333.
[69] Sheppard, *supra* note 59.
[70] Yuval Noah Harrari, "Sapiens: A Brief History of Humankind" (New York, Harper Collins: 2015)
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*

Public administrative law centralizes adjudicating procedural fairness. In some cases, judges underlined that administrative law is the most convenient "source of protection for ensuring government accountability and respect for human rights". Having this in mind, in the case of *Medovarski v. Canada*, where two permanent residents were ordered for deportation for serious criminality, the Chief Justice Beverley McLachlin noted that "even if liberty and security of the person were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice."[74] This is due to the distinction between a citizen and a non-citizen. As set out by the SCC in *Chiarelli v. Canada (Minister of Employment and Immigration)*[75], "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada." Hence, the deportation of a non-citizen in itself cannot imply the liberty and security interests protected under the Canadian Charter of Rights and Freedoms.[76]

The SCC's reasoning confirms the standpoint theory: those with power and authority do not have experiential knowledge that those with less power in society hold.[77] As elaborated by Sheppard

> [i]t is unlikely that those who have enjoyed power and privilege based on the historical institutional status quo will be capable of imagining the kinds of transformations needed to implement human rights norms. To them, exclusionary norms and practices often appear necessary, despite their unfortunate effects on those who have been denied equality rights.[78]

[74] Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration) 2005 SCC 51, para. 47.
[75] *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733
[76] Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration) 2005 SCC 51, para. 46.
[77] Sheppard, *supra* note 59.
[78] Sheppard, *supra* note 59 at 68.

The case of *Medovarski v. Canada* exemplifies these exclusionary norms and practices, which are deemed necessary while enforcing crimmigration rules without considering their unfortunate effect on those who are denied equality rights.

The concept of citizenship and its entitlements including voting and democratic rights exclude non-citizens in the political domain.[79] In *R. v. Mills* (1999), the SCC observed that "constitutionalism can facilitate democracy rather than undermine it, and that one way in which it does this is by ensuring that fundamental human rights and individual freedoms are given due regard and protection…constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority."[80]

In *Andrews v. Law Society of British Columbia,* Wilson J. affirmed that

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated…Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation in Book III of *Considerations on Representative Government* that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked…" I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions

[79] Sheppard, *supra* note 59.
[80] R. *v.* Mills, [1999] 3 S.C.R. 668, para. 58.

should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.[81]

3. Conclusion: Changing our mindset regarding the conception of the human rights of foreigners in immigration proceedings

States are confronted with two main hurdles while developing crimmigration policies. The first challenge is related to the asymmetric incorporation of criminal justice model into immigration law. This is mainly because the borrowing of criminal enforcement strategies causes a tension with the civil nature of immigration law. Although states firmly adopted principles of criminal enforcement model into immigration law, they omitted to incorporate its procedural safeguards. The Wanted by the CBSA list is one of the examples to prove this point. Arguably, states prefer to reject vesting non-citizens with procedural safeguards because of their lack of citizenship. One good example for this argument is the integration of returning Canadian jihadis into the society whilst detaining or deporting non-citizens who are suspected or convicted of criminality (e.g. Al Yamani case[82]). This distinction between a citizen and non-citizen derives from the sovereignty claim of states within their borders.

Can the differential treatment between a citizen and a non-citizen be amount to discrimination within the area of crimmigration? Throughout history there was an exception to the principle of equality. We analysed predominantly Canadian cases before the Supreme Court of Canada to understand what is justifiable to violate the principle of equality within the field of crimmigration in the 21st century. We conclude that migrants who are suspected and/or

[81] Andrews *v.* Law Society of British Columbia, [1989] 1 S.C.R. 143, p. 152.
[82] Al Yamani v. Canada (Minister of Citizenship and Immigration) (2006), 149 C.R.R. (2d) 340; 58 Imm. L.R. (3d) 181 (F.C.)

convicted of serious criminality are undeserving of equality and thus treating them less favourably is fully justifiable.[83]

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