Guest Post: Professor Joanna Harrington on Canadian Legal Values, Extradition, and Life Imprisonment Without Parole

Introduction

How do we determine the Canadian legal values that animate and guide the application of Canadian law and the making of Canadian legal decisions? That is the question raised upon reading this week's decision by the Alberta Court of Appeal, concerning the extradition of an Iraqi-Canadian citizen, and Edmonton resident, from Canada to the United States to stand trial for the alleged facilitation of acts of terrorism. If convicted, the possible sentence to be served is one of life imprisonment without parole, a matter taken as fact by the Alberta Court of Appeal (see *United States v Muhammad 'Isa*, 2014 ABCA 256 at paras 67-74). But a "life-without-parole" or "life means life" sentence with no opportunity to make application has no counterpart in Canadian law, raising the question of whether Canadian legal values should require Canada to seek an assurance to address this risk. The judgment also raises the question of how we determine what those Canadian legal values are, as compared with and in contrast to American legal values, or the legal values of others.

The 'Isa Case

Known by several names, Edmonton resident Faruq Khalil Muhammad 'Isa is wanted for trial before the United States District Court for the Eastern District of New York on charges of conspiracy to murder American nationals abroad and the provision of material support to terrorist conduct. These are the two charges laid out by the United States in its diplomatic note to Canada in March 2011, with a supplementary note of January 2012 adding a further five counts of aiding and abetting the murder of Americans abroad. 'Isa is alleged to have served as a member of a terrorist network that facilitated and procured supplies for two suicide bomb attacks in Iraq that killed several American soldiers (with persons of other nationalities, including Iraqi, also harmed or killed). 'Isa's alleged involvement has not taken place on US soil, but from Canada, by phone and computer.

Last summer, Canada's Minister of Justice authorized 'Isa's surrender to the United States, after having obtained an assurance (or solemn promise) from the United States that 'Isa, if extradited, would not face the death penalty. Such death penalty assurances are now commonplace, with Canada following a trend established long ago by European and Latin American states whereby their embrace of certain fundamental legal values compel the receipt of these assurances to pave the way for surrender (see *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283). Canada would later receive a further assurance from the United

States in April 2014 that 'Isa would not be detained in military custody of any kind.

'Isa, however, remains in Canada, with his surrender on hold while his counsel appealed the decision of the extradition judge to issue a committal order and sought judicial review of the minister's decision to surrender. Both efforts were dismissed by the Alberta Court of Appeal this week, with the judgment likely to generate comment on a number of fronts, including the curative aspect with respect to the use of evidence obtained by torture as well the Court's embrace of a high standard of deference. There is also the matter of an accused's extradition from Canada to face an acknowledged risk of life imprisonment without parole.

The Use of Evidence Obtained By Torture

Much of the case against 'Isa appears to rest on his own words, obtained through wiretap recordings and the data-mines from his computer, and through post-arrest interviews with the RCMP, and with a US Justice Department Investigator. These words were considered to establish a sufficient case in support of extradition before the extradition judge as well as the Alberta Court of Appeal, with the Court of Appeal rejecting arguments that 'Isa's post-arrest statements were made involuntarily and in breach of his right to counsel.

'Isa has also alleged that there is a risk that evidence will be used against him that was obtained by torture, but the extradition judge found that these allegations failed to raise the required "air of reality" that information obtained by torture would be relevant to issues properly raised in the extradition hearing (*United States of America v Muhammad 'Isa*, 2012 ABQB 344). On appeal, 'Isa's lawyers successfully challenged the standard that had been applied by the extradition judge, prompting the Alberta Court of Appeal to write with emphasis that "evidence obtained by torture is unreliable, offensive to the rule of law and the product of an abhorrent practice …" (see para 29, with fans of the late Tom Bingham being pleased to see a supporting citation to the former Senior Law Lord's book on *The Rule of Law*). But while the allegations of torture were now found to have an air of reality, the Court found no miscarriage of justice or a substantial wrong that would bar the exercise of its curative power to address this aspect of the proceedings before the court below.

The Life Imprisonment Challenge

As for the application for judicial review, it too was unsuccessful, with Alberta's highest court embracing an approach that accords a high degree of judicial deference to a ministerial decision to extradite, citing in support the Supreme Court of Canada's decision in *Sriskandarajah v United States of America*, 2012 SCC 70, [2012] 3 SCR 609. An argument that the minister had started from a pro-surrender standpoint was readily dismissed, as was an argument concerning the minister's determination as to the offences for which his extradition is sought, which leaves the life imprisonment argument for further comment.

It was argued by 'Isa's counsel that the minister's decision to surrender 'Isa to the United States would violate both Canadian extradition law and the *Canadian Charter of Rights and Freedoms* by reason of the possibility that 'Isa might receive a sentence of life imprisonment without parole. As noted above, and as acknowledged by the Alberta Court of Appeal, such

sentences have no counterpart in Canadian law, with Canada's elected lawmakers having enacted a provision within our Criminal Code that provides for parole eligibility after the passage of a period of time. That is Parliament's will, and presumably an indication of Canadian views with respect to "life should mean life" sentences, albeit that there are cases of extremely heinous crimes where, in practice, one can readily predict that no application for parole will ever be successful. But knowing you don't have a strong case for parole is a different matter from not having any possibility or option to apply for parole.

The Alberta Court of Appeal clearly disagrees, portraying the matter as one of prison sentence differentiation, with the potential for a more severe prison sentence in one state, as compared to another, not being a bar to extradition. But there's more afoot in 'Isa's case than sentence length differentiation. Indeed, even when two prison sentences are the same in length, there would still be a qualitative difference if one of those sentences is say served in shackles, or in solitary confinement, or without access to medical care. And that's why courts in Canada, as guardians of the Constitution and the rule of law, are obliged to inquire into the nature of the punishment or treatment to be meted out in the requesting state, with 'Isa's case raising concern given the lack of process for a form of early release or parole.

Moreover, the very fact that there is differentiation between states is precisely why extradition law makes use of assurances, with the requirement for an assurance enabling the requested state to add conditions to a surrender that are reflective of the legal values of the requested state. The Court makes no mention of the United States having any objection to providing such an assurance, with the American authorities clearly capable of securing assurances when asked, having already provided two in 'Isa's case.

The Alberta Court of Appeal has held that 'Isa's circumstances do not bring him within the scope of what the Supreme Court of Canada had described in *Burns* as a "particular treatment or punishment [which] may sufficiently violate our sense of fundamental justice as to the tilt the balance against extradition." To seal this argument, the Court refers to the examples of "stoning adulterers or amputating the hands of thieves", harking back to examples provided in 2001 by the Supreme Court of Canada in *Burns*. But the more cogent comparator for a life sentence without parole is surely a sentence of death, with countries such as the United Kingdom having brought in what are termed "whole life" sentences as a replacement when capital punishment was abolished. (Another well-respected British judge, Lord Justice Laws, has opined that "a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death": *R (Wellington) v Secretary of State for the Home Department*, [2007] EWHC 1109 (Admin) at para 39.) Sentences of death were also the very focus of the *Burns* decision, with the end result being that capital punishment so violates our *Canadian* sense of fundamental justice that an assurance is required to secure the extradition of an accused from Canada to a death penalty state. Indeed, many countries in Europe and Latin America have long taken the view that sending an accused to face a life sentence without parole is either akin to, or worse than, an extradition to face a judicially-imposed sentence of death, with these countries viewing both as violations of the fundamental prohibition on unjust, cruel, inhuman or degrading treatment or punishment.

The Evolving Extradition Practice of Other States

The Alberta Court of Appeal does not mention the views of other countries, with Canada having a number of extradition partners, in addition to the United States. Extradition law and practice changes over time, with several states now refusing to extradite an accused to face life imprisonment without the possibility of release or parole, absent an assurance. One of the earliest states to adopt such a practice is Portugal, which has long refused to extradite persons who face what it has termed "life-long" sentences, lodging a formal reservation to this effect back in 1990 to the European Convention on Extradition (an extradition arrangement now attracting 50 states). Some states accepted this reservation with their silence, but Germany, unsure as to the meaning, lodged an official response, stating that: "It takes the reservation to mean that the only circumstance in which extradition will not be granted is where there is no possibility under the law of the requesting state for the person sentenced to life imprisonment, having completed a certain proportion of the sentence or period of detention, to obtain a judicial review of his case with a view to having the remainder of the sentence commuted to probation." Austria followed suit, by expressing agreement with Germany, with the texts of the Portuguese, German and Austrian statements to be found in the documentation submitted to the UK Parliament when it joined the European Convention on Extradition in early 1991: UKTS No 97 (1991). Soon thereafter, Switzerland expressed its agreement with Germany and Austria, as would Russia in 1999, with Belgium in 1997 making a second attempt at clarification by referring to the situation when "the person sentenced to life imprisonment cannot be released after a certain time, following a legal or administrative procedure." The Treaty Office of the Council of Europe duly records each state's official declaration here**.**

But what about the context of terrorism? Does that provide an exception or an overriding reason to extradite even with the risk of life imprisonment without parole? A review of the record suggests no, with many European states continuing to maintain an objection to extradition to face life imprisonment without the possibility of parole or early release, as illustrated by reference to the 2003 Protocol to update the 1977 European Convention on the Suppression of Terrorism. Motivated by the devastation of the September 2001 attacks, the clear goal of the Protocol's drafters was to expand the list of offences considered terroristic for the purposes of extradition. But the Protocol also makes clear that nothing in the revised treaty is to be interpreted so as to impose an obligation to extradite where there is a risk of torture, the death penalty, or life imprisonment without the possibility of parole (Article 4). Admittedly, the 2003 Protocol is not yet in force, being an amending treaty that requires the consent of all, but it has, to date, attracted 31 states parties.

There is also the 2005 Council of Europe Convention on the Prevention of Terrorism, a treaty which is in force, and which despite its generic title, aims to criminalize, and make extraditable, the offences of public provocation to commit terrorism, recruitment for terrorism, and training for terrorism (Articles 5-7). This convention also aims to enhance international cooperation by modifying existing extradition arrangements as between contracting states so to ensure that the above offences are recognized as extraditable crimes (Article 19). Nevertheless, we also see a balance arising between criminal law

cooperation and enforcement and safeguards for an accused, with Article 21 of the 2005 Convention expressly providing that nothing in the convention shall impose an obligation to extradite where there is a risk of torture, inhuman or degrading treatment, the death penalty, or life imprisonment without the possibility of parole. The convention's Explanatory Report explains that the Article 21 safeguards are provided "to make clear that this Convention does not derogate from important traditional grounds for refusal of cooperation under applicable treaties and laws." An extradition request refused on such grounds is then submitted for prosecution in the requested (not requesting) state.

Much like Portugal and Spain, a number of Latin American states with a Catholic tradition view a life sentence to be as cruel and inhumane as a death sentence, and contrary to goals of prisoner rehabilitation. As a result, a prohibition on extradition to face life imprisonment can also be found within the inter-American extradition regime, with article 9 of the 1981 Inter-American Convention on Extradition stating clearly that: "The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced."

As a result, in light of evolving extradition practice, the Americans would surely not be surprised if Canada also required an assurance, as a precondition for extradition, removing the risk that a surrendered accused would face life imprisonment without parole. We know that other states have received such assurances from the United States, including France, which secured such an assurance in relation to murder charges (see *Nivette v France*, App No 44190/98, Judgment of the European Court of Human Rights of 3 July 2001).

The Views of Courts

Lastly, there are the views of courts. To its credit, the Alberta Court of Appeal does acknowledge that the Quebec Court of Appeal has come to a different conclusion, viewing the prospect of a life sentence without the possibility of parole for a youth wanted for extradition to face charges of second-degree murder in the United States as extreme and in violation of Canadians' sense of fundamental justice (see Doyle Fowler c Canada (Ministre de la Justice), 2011 QCCA 1076; see also Doyle Fowler c Canada (Ministre de la Justice), 2013 QCCA 1001; leave to appeal to the Supreme Court of Canada denied September 19, 2013). For the Alberta Court of Appeal, the fugitive's youth is the distinguishing factor.

But court challenges to "life means life" prison terms are taking place elsewhere, with the German Federal Constitutional Court, on January 16, 2010, having refused an extradition to Turkey where the accused faced "aggravated life imprisonment until death" (the aggravation aspect meaning that it was a fixed-term life sentence). In that case, the German government had sought assurances that the accused would be considered for release, but the Turkish government in reply merely noted that the Turkish President had the power to remit sentences on grounds of chronic illness, disability, or old age. The German court refused to allow the extradition, finding the President's power to be insufficient, and holding

that a prison sentence with no practical prospect of release is cruel and degrading.

Arguments against extradition to the United States to face a sentence of life imprisonment without parole have also come before Britain's highest court, with the Law Lords finding that the imposition of such a sentence does not constitute inhuman and degrading treatment per se unless it was grossly or clearly disproportionate (see *R (Wellington) v Secretary of State for the Home Department*, [2008] UKHL 72). The Law Lords have also embraced the desirability of extradition, suggesting that a punishment that might be regarded as inhuman or degrading within the domestic context may not bar extradition when a choice has to be made between either extraditing or allowing a fugitive offender to evade justice altogether. No mention is made, however, of the use of assurances as a means to avoid this stark choice, nor is guidance provided with respect to the alternative of submitting the case for prosecution within the requested state. There is also the case of *Babar Ahmed and Others v United Kingdom*, decided in 2012, where the Fourth Section of the European Court of Human upheld a British decision to extradite alleged terrorists to the United States to face a risk of life imprisonment without parole.

But the *Wellington* judgment, as well as that in *Babar Ahmed*, must now be reevaluated in light of the release in July 2013 of a Grand Chamber decision from the European Court of Human Rights in *Vinter and Others v United Kingdom*, a point that has been made by leading expert on imprisonment law, Professor Dirk van Zyl Smit, writing with others in "Whole Life Sentences and the Tide of European Jurisprudence: What is to be Done?" (2014) 14:1 *Human Rights Law Review* 59-84. By definition, Grand Chamber decisions are for cases of importance and they serve to address competing interpretations of fundamental rights (with the earlier 2012 decision in *Vinter* having been decided by a vote of 4 to 3).

The *Vinter* case was brought by three prisoners, all serving mandatory sentences of life imprisonment, and all three having been given what are termed "whole life" orders. Ordinarily, mandatory life sentences in England and Wales, as in Canada, have a minimum period that must be served before a prisoner can have a review of the continuing relevance of his imprisonment. But British law, as enacted by its Parliament, provides for the issuance of a whole life order for offences considered so heinous, with only the Justice Minister permitted by statute to release a whole life prisoner and only on compassionate grounds. Whole life orders are thus an exceptional measure and indeed, the UK government's own figures, as presented to the court, indicate that of 4,900 prisoners serving mandatory life sentences for murder in England and Wales in 2011, only 41 were subject to whole life orders (including those held in secure hospitals). Moreover, since 2000, no prisoner serving a whole life term in England and Wales has been released on compassionate grounds.

By a vote of 16 to 1, the Grand Chamber of the European Court of Human Rights has now made it clear that a life sentence is only compatible with the fundamental prohibition on inhuman and degrading treatment when there is some prospect of release and some possibility of review. The Court engaged in an extensive review of European, comparative and international law materials on life sentences, finding an emphasis in European penal policy on the rehabilitative aim of imprisonment, particularly towards the end of a long

prison sentence. The Court has also indicated its support for the institution of a mechanism that provides for a review no later than 25 years after the imposition of a life sentence for murder – a time period that is consistent with the Canadian Parliament's position.

Final Thoughts

To be clear, the Grand Chamber's decision in *Vinter* does not ban whole life sentences, but it does make an argument for considering the fundamental nature and value of a process for review and possible release. The Alberta Court of Appeal makes no mention of the *Vinter* decision, nor for that matter, the decisions in *Babar Ahmed* or *Wellington* (which mention the key Canadian cases, including *Burns*). There is, of course, no obligation on a Canadian court to consider foreign law, but extradition is inherently international in nature and looking outwards to examine recent trends within both extradition law and human rights law provides insights into the questions to ask, not least the question of whether a requirement for an assurance would secure the desired balance between criminal law enforcement and the safeguarding of Canadian legal values. There is also the question of relativities as between Canada and the United States (and elsewhere), and whether Canadian legal values, with due regard to the position taken by Parliament (rather than the executive branch), should guide a Canadian assessment of what is unjust or oppressive, or inhuman or degrading, so as to bar an extradition without an assurance.

Traditionalists in international law, given their strong embrace of a state's sovereign right to its own views and laws, might well suggest that a Canadian minister, making a Canadian decision to extradite, under Canadian law, about a person in Canada, conducting alleged activities in Canada, should not hesitate to attach a precondition to an order of surrender that is reflective of Canadian legal values. Canadian law provides an opportunity for all those given life sentences to apply for parole after the passage of a period of time. Such applications can be denied, especially in cases of heinous crimes, but Parliament's decision to ensure there is an opportunity to apply highlights a fundamental due-process difference in legal values between Canada and the United States (and the United Kingdom). Many other countries also agree, developing over time a practice to bar extradition to face a life imprisonment without parole on the grounds that such a sentence is as unjust or oppressive, or as cruel or inhumane, as being sent to face a sentence of death.

**Joanna Harrington is a professor of law at the University of Alberta and a co-author of the second edition of International Law: Doctrine, Practice, and Theory (Irwin Law, 2014).*