CANADIAN ARAB INSTITUTE
INSTITUT CANADO-ARABE

POLICY BRIEF
May 2014

THE NEED TO PROTECT RULE OF LAW: A RESPONSE TO BILL C-24

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Special thanks to **Ziyaad Mia** for his comments on earlier drafts of the brief.

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Bill C-24: *An Act to amend the Citizenship Act and to make consequential amendments to other Acts* was thoroughly analyzed against Canadian constitutional principles of fundamental justice, equality and fairness. This brief focuses on the aspects of the bill that deal with the "expanded provisions against granting citizenship" and the "revocation of citizenship."

KEY FINDINGS

1. The authority to revoke the citizenship of immigrants violates Charter equality rights and creates a duality of classes in citizenship
2. Certain communities in Canada, particularly Arab and Muslim Canadians, may be affected disproportionately by the proposed legal changes to the Citizenship Act
3. The bill is vague in places, undermining constitutional principles of fundamental justice, equality and fairness
4. Enhancing ministerial discretion without sufficient oversight opens the possibility of politicizing decisions to deny or revoke citizenship
5. The bill permits the Government of Canada to base its decisions on the actions of criminal justice systems in other countries that may not comply with international human rights law
6. This bill has the potential to ruin lives. As such, the stakes are incredibly high

INTRODUCTION

Bill C-24: *An Act to amend the Citizenship Act and to make consequential amendments to other Acts* was introduced on 6 February 2014. The stated aims of the bill are to "update eligibility requirements for Canadian citizenship, strengthen security and fraud provisions and amend provisions governing the process of applications and the review of decisions." More specifically, **it touches upon several issues concerning equality of rights**, including, but not limited to, residency and language requirements, citizenship for service men and women as well as their children, rules relating to adoptions, as well as the grounds for both denying and revoking citizenship to individuals who are believed to have committed fraudulent activities or armed conflict against Canada. It also **grants considerable authority to the Minster of Citizenship and Immigration to determine the citizenship status of particular cases**. Not surprisingly given the range and scope of the reforms, Bill C-24 has been controversial.

This policy brief will not attempt to critique all of the proposed reforms found in the bill. Rather, it **will focus on the aspects of the bill that deal with the "expanded provisions against granting citizenship" and the "revocation of citizenship**."

In and of themselves, there is nothing inherently problematic with introducing reforms to Canadian law that are intended to prevent and deter fraud, and protect Canadian national security and public safety. Both are legitimate and necessary pursuits of the government. However, **reforms that are vague and that increase executive authority at the expense of rule of law can often lead to a host of new problems**, ones in which the rights of citizens and non-citizens alike are undermined. The consequences could be devastating for individuals and their families, as well as for particularly vulnerable communities, such as Muslim and Arab communities, whose members would have to live in fear that their citizenship could be legally revoked depending on how the law is applied. To prevent either of these outcomes, **any reforms must be consistent with Canadian constitutional principles of fundamental justice, equality and fairness**[1].

EXPANDED PROHIBITIONS AGAINST GRANTING CITIZENSHIP

Bill C-24 contains a number of new grounds for permanently denying citizenship to individuals, particularly those who have or are believed to have engaged in fraudulent activities, who are found to be or are believed to pose a threat to national security, or who have or are believed to have "engaged in certain actions contrary to the national interest of Canada." The Government of Canada has both a sovereign right to determine who is granted citizenship; it also has a duty to

[1] A number of these values stem from the Charter of Rights and Freedoms. Of note, the Supreme Court of Canada determined outlined a balancing test for the infringements of Charter rights, now known as the Oakes Test, which requires that any infringements of rights be minimal, reasonable, proportional to the offence in question. *R. v Oakes*, [1986] 1.S.C.R. 103.

protect public safety. However, the law as it is proposed is not only vague, but it undermines the principles of fundamental justice as set out in section seven of the Charter of Rights and Freedoms[2]. For example, denying citizenship to someone who has been "charged," but not convicted, by a foreign court with committing an indictable offence undermines the fundamental legal and constitutional principle that everyone is innocent until proven guilty through fair and transparent processes. As critics have noted, this provision of the bill **would permit the Government of Canada to base its decisions on the actions of criminal justice systems in other countries**, which may include states in which the courts are neither impartial nor independent, and which may accept evidence obtained through torture or ill-treatment of prisoners[3].

Prohibiting citizenship to permanent residents on the grounds that they participated in activities that are "contrary to the national interest of Canada" is also far too open-ended, and could be interpreted to include a whole range of activities. For example, it is conceivable that individuals who were arrested during the 2010 G20 protests in Toronto acted "contrary to the national interest," since the meeting involved advancing the Government of Canada's relations and standing with foreign states. Similarly, activists from Colombia who have criticized their country's free trade agreement with Canada for not adequately ensuring that trade, which is in Canada's national interest, does not have a negative impact on the human rights situation could be found to be in violation of the law and be permanently denied Canadian citizenship. Indeed, **there are any number of situations in which an individual's political activities could be construed as being "contrary to the national interest**." As such, this particular provision of Bill C-24 is too vague to be constitutional, and, if challenged, could in all likelihood, be found to be an infringement of the Charter[4].

[2] Section 7 of the Charter of Rights and Freedoms states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." *Constitution Act, 1982*

[3] Nicolas Rouleau, "If Canadian citizenship becomes more 'exclusive' it must be more meaningful," The Globe and Mail, 27 February 2014.

[4] See *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555

THE REVOCATION OF CITIZENSHIP

While expanding the grounds for denying citizenship is not unprecedented, Bill C-24 would, in its current form, **provide the government with new powers to revoke an individual's citizenship**. It envisions a "hybrid model" in which the Minister of Citizenship and Immigration is granted the authority to determine whether a Canadian citizen or individual with dual citizenship has violated the Citizenship Act and can therefore have his or her citizenship revoked in all cases except those in which inadmissibility is "based on security grounds, on grounds violating human or international rights or on grounds of organized criminality," which will be determined by the Federal Court. Revoking the citizenship of those engaged in the activities listed above is, at its core, an abdication of the state's obligations to all its citizens, even those who are or believed to be engaged in activities that pose a danger to Canadian society. Moreover, **the authority to revoke the citizenship of individuals who have immigrated to Canada, but not those born in Canada, violates Charter equality rights**, specifically the principle that "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[5]."

Several aspects of the bill are problematic. In cases where citizenship is revoked because the individual is *believed* to have violated the Citizenship Act, the Government of Canada would be offending the constitutional principles of fundamental justice and administrative fairness. Moreover, in cases where the person has been found to have violated the act, and has already been sentenced, removing the person's citizenship is an additional and gratuitous punishment. Furthermore, Bill C-24 would allow the minister, not a court, to revoke an individual's citizenship in cases in which the person had been convicted of a terrorism offence prior to the law coming into effect, thus permitting the Government of Canada to apply the law retroactively to Canadian citizens who have already been sentenced for the crimes with which they have been convicted. Similarly, **the burden of proof falls to the individual, not the state, to prove that he or she is not a citizen of another country**. In cases that do go before the Federal Court, the proposed law states that the Court "with respect to additional evidence, is not bound by any legal or technical rules of evidence and may receive and base its decisions on any evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances." Under this section, **it is conceivable that the Federal Court could allow evidence obtained through torture** if the evidence was deemed to be "credible or trustworthy." Finally, the law limits individuals' ability to challenge a negative decision. **Appeals can only be made to the Federal court of Appeal in cases involving a "serious question of general importance," which is a high standard** reserved only for cases that involve a significant legal question

[5] Section 15(1) of the Charter states, "(1) 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 and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Constitution Act, 1982*

pertaining to the law that is deemed to require judicial interpretation.

Bill C-24 would **allow the Government of Canada to revoke the citizenship of a Canadian convicted through flawed processes**, such as the military tribunals at Guantanamo Bay, Cuba. Since its establishment, the military tribunal system at Guantanamo Bay has been criticized for allowing proceedings that fall well short of international and U.S. domestic standards for a fair trial, which include well-established norms such as the right to a public trial, disclosure of evidence and the inadmissibility of evidence obtained through torture or ill-treatment. Dual nationals found guilty of a terrorist offence by this type of court system – or any other that does not meet international standards – could easily find their citizenship revoked. With little chance to appeal the decision, these **individuals would be subject to deportation and loss of access to diplomatic assistance, their fate resting in the hands of a foreign penal system** that may or may not satisfy international standards concerning detention. And the application of this part of the law could be sweeping. Once in effect, it could be applied to individuals affiliated with any number of social justice, separatist or independence movements around the world, many of which have engaged in acts of violence.

RECOMMENDATIONS

1. The Government of Canada should remove the provisions of the bill that allow for the revocation of citizenship.

2. Should the provisions remain in place, under no circumstances should citizenship be revoked in cases in which evidence against the individual was obtained through torture or cruel and unusual treatment. Distinctions in the law should also be made between convictions made by civilian courts and military tribunals.

3. The Federal Court should have jurisdiction over all these cases involving the revocation of citizenship in order to lessen the risk of politicization.

4. Individuals whose citizenship is revoked must be guaranteed the opportunity to appeal a negative decision. Appeals should be granted on matters of fact and law.

5. In cases in which citizenship is revoked, the federal government must not deport individuals to countries in which there is objective evidence of systematic torture and use of the death penalty, and all deportation decisions must be subject to judicial review.

CONCLUSION

The types of proposed reforms found in Bill C-24 are by no means isolated. Indeed, the bill is reflective of a larger trend in Canadian law. Since the mid-1980s, but particularly since September 11th, there have been a series of legal changes that have eroded the legal rights of individuals who are either alleged to have or been found to have violated Canadian laws. Successive Canadian governments have responded by enacting changes designed to limit refugee claimants' ability to make an application in the first place, detain and eventually deport those who are considered to be real or potential threats to national security and public safety, and

deter against large-scale illegal human smuggling into Canada. In doing so, the federal government has often responded to pressures on the immigration and refugee systems by limiting – and in some cases blocking entirely – claimants' ability to challenge negative decisions, particularly on "matters of fact," through the creation of an immigration system that allows for little judicial oversight.

Although Bill C-24 is not explicitly racialist, its potential application is. Since September 11th, certain communities in Canada, particularly Arab and Muslim Canadians, have been affected disproportionately by legal changes designed to protect the greater Canadian collective[6]. It is quite conceivable that the same would be true of the provisions in the Bill that are discussed above. In practice, it could be very difficult for members of these communities to acquire or retain citizenship. For example, would Maher Arar, the dual Canadian-Syrian national who was falsely accused of being affiliated with a terrorist organization, been able to prove that he was not in violation of the law had Bill C-24 been in place a decade ago? Given that it took a public inquiry to clear his name, chances are he would not have been able to do so. **Such a law has the potential to ruin lives. As such, the stakes are incredibly high.**

Bill C-24, as well as the reforms that came before it, highlight one of the central and most difficult tests facing liberal democracies that are destination points for those seeking a better life: how to resolve the seeming incompatibility of principles of fairness, compassion, and legal obligations to protect the security of the individual with the state's interest in maintaining control of its sovereignty. **Increasing ministerial discretion to determine matters of citizenship without sufficient oversight is not the right response** to this challenge. It opens the door for greater arbitrary rule in cases where the stakes are very high. If adequate safeguards that protect rule of law are not included, the law in its current form has the potential to put the lives and well-being of individuals and communities at risk. **In its current form, Bill C-24 contravenes the Charter principles of fundamental justice and equality, and does so in ways that are not morally or legally justifiable**.[7]

[6] International Civil Liberties Monitoring Group, **"**Submission of Information by the ICLMG to the Office of the High Commissioner for Human Rights in relation to the Human Rights Council's Universal Periodic Review of Canada to take place in April 2013," October 2012. See also, Jenna Hennebry and Bessma Momani, "Introduction," in *Targeted Transnationals: The State, the Media, and Arab Canadians*, Jenna Hennebry and Bessma Momani, eds. (Vancouver: University of British Columbia Press, 2013).

[7] Section 1 of the Charter of Rights and Freedoms states: "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." *Constitution Act*, 1982.