

Combating Anti-Asian Hate Crimes under the Rule of Law

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(Outline)

1. The Rule of Law perspective

- (1) There has been an alarming resurgence of anti-Asian hate crime incidents, in particular racist crime incidents targeting Chinese and other Chinese-looking people in Canada since the beginning of the Covid-19 pandemic. Canadians should stand together against all forms of racism.
- (2) Combating racism and hate crime requires a comprehensive and systematic approach. Raising awareness and improving education alone are not enough. We need to make better use of our laws and law enforcement.
- (3) Improving our understanding of the Canadian legal/justice systems and our trust in the rule of law is a key to achieve solidarity against racism. Lack of basic understanding and trust in the Canadian systems leads to underreporting of hate crime incidents, reluctance in assisting law enforcement, confrontation between communities and reverse racism, violent social unrests, riots and massive racial conflicts.

2. Trust in the Canadian system

- (1) While recognizing that racism and hate crimes are real challenges to public safety in our society, and while continuing the effort to seek truth and reconciliation, it will be misleading and counterproductive to presume that Canada is inherently a racist country and the Canadian legal and justice systems are fundamentally racist.
- (2) The Canadian law prohibits racial discrimination of all its forms and protects equal rights of all Canadian citizens. The Canadian criminal law punishes racist hate propaganda and imposes aggravated sentence on hate crime offenders. Canadians should not discredit our legal system but to improve it.
- (3) Governments at all three levels in Canada condemn anti-Asian racism and violence. It is encouraging to see that they are committing more resources to combat anti-Asian racism and hate crimes this year. In June 2021, the Canadian government responded to a call from Asian Canadians and amended Canada's Anti-Racism Strategy 2019-2022 to add anti-Asian racism to the list of targets. In July, Canadian Heritage announced its campaign to teach "non-racialized Canadians" about "systemic racism", confirming that during the pandemic "Indigenous, Black, Asian, Muslim and Jewish communities faced more racism and hate crimes." In August, the federal government announced a two-year budget of \$50 million to fight racism, on top of the \$45 million already committed for the 2019-2022 Strategy. We applaud and support these actions.
- (4) We are proud of Canada being internationally rated the best country for welcoming immigrants in the world and a country with more racial equality and least racism than most others.
- (5) For many years, Canada has been receiving over 50% of its new immigrants from Asia, which is more than about 4 times of new immigrants from Europe. The top three source

countries are India (over 80,000-100,000/year), China (over 30,000-35,000/year), and the Philippines (over 27,000-32,000/year).

- (6) In the U.S. News 2021 Best Countries Report, Canada is ranked the #1 best country for “social purpose” in the world. Canada earned three full scores of 100 for caring human rights, commitment to social justice, and racial equity. In the World Justice Project Rule of Law Index, Canada has always been one of the top 10 best countries for many years.

3. Issues in law, policies, and practice

- (1) *Need of improvement.* While acknowledging the strengths of our systems, we need to identify and address the problems in our laws, policies and practice. In the context of laws and criminal justice, rather than assuming “systemic racism” or “white superiority” “across the entire system”, it is more productive to explore the specific weaknesses and loopholes in certain parts of the system with pragmatic plans of actions to address these problems.
- (2) *Underreporting of hate crime incidents.* Although many citizens or immigrants of Chinese ethnicity recall they were victimized by racism or hate incidents, many felt helpless, and very few of them would report to the police or seek assistance from any legal institutions. It is also common that victims of anti-Asian hate crimes are reluctant to cooperate with the police and testify in court.
- (3) *Disparities in law enforcement.* Police departments in different jurisdictions in BC, for example, have handled similar hate crime incidents differently. There is a perception among many Chinese Canadians that the police would take the cases less seriously if the victims are ethnic Chinese. In Richmond, there were two high-profile hate incidents in 2019-2021 with similarities. Thousands signed up to the petitions demanding the RCMP press charges. The RCMP took action in the 2021 incident but not the 2019 incident. (*Endnote 1. Hate incidents in Richmond, BC.*)
- (4) *Rare anti-Asian hate crime cases in Canadian case law.* According to a report published by the Department of Justice Canada, from 2007 to 2020, in Canada, there was only one case in published case law in which the accused person was accused of committing the crime because of hatred towards Asians. Also, until recently, in comparison with media coverage of hate crime cases against other visible minorities, there was very limited coverage of anti-Asian hate crime cases in the judicial process.
- (5) *Missing definition of hate crime in the Criminal Code.* In the Canadian Criminal Code, there is no definition of hate crime in general. Hate motivation is defined as a sentence enhancement circumstance under Section 718.2. Therefore, it is often believed that aside from hate propaganda, crimes motivated by bias, prejudice or hate based on race, national or ethnic origin, colour, religion et al. are not hate crimes.
- (6) *Vagueness in defining hate speech.* The majority of self-reported anti-Asian hate incidents are in the form of verbal harassments, not physical violence. The line between legally prohibited hate speech and legally prohibited free speech is still to be clarified. Is racist hate speech in public a crime? It is widely believed that hate speech in public is not a crime unless it becomes “hate propaganda”, which is the incitement or promotion of hate rather than an expression of hate. It is also considered that racist hate speech in public is free speech under the protection of the law unless it encourages violence. Indeed, Canadians have been debating if the law can place restrictions on hate speech for many decades, even the restrictions are civil rather than criminal. From 1990 to 2013, the

Supreme Court of Canada decided that civil restriction on public hate speech was a justifiable limitation on free speech in Canada.

The Canadian Criminal Code has three definitions of offences under the title of “hate propaganda”, namely advocating genocide under s.318, public incitement of hatred under s.319(1), and willful promotion of hatred under 319(2). It is widely recognized that pressing a charge of hate propaganda in Canada is rare and difficult in practice, and the prosecution of willful promotion of hatred requires the approval of the Attorney General (s.319(6)). Placing all three sections under the title of “hate propaganda” is problematic, because “propaganda” is often defined as “the dissemination of information to influence public opinion” that consists of the “systematic effort to manipulate other people’s beliefs” with “specified goals,” and the best examples are the massive propaganda campaigns in Nazi Germany (*Encyclopaedia Britannica*).

(7) *Difficulties in proving hate motivation*. Hate is an aggravating factor at sentencing under Canadian law. It is widely recognized that hate motivation is often difficult to prove in court. However, incidents of public hate speech indicating explicit hate motivation are often deemed as “hate incidents” rather than hate crime incidents.

4. What can be done next

(1) *Recognizing the justified restriction on the freedom of express in a democratic society*.

Placing restrictive rules on speech, especially the expression of ideas without threatening the use of violence, is always controversial in a true democracy. For example, in the 2021 federal election, the People’s Party announced its policy on the freedom of expression was to “restrict the definition of hate speech in the Criminal Code to expression which explicitly advocates the use of force against identifiable groups or persons based on protected criteria such as religion, race, ethnicity, sex, or sexual orientation.” In Canada, everyone enjoys the freedom of expression but racist hate speech in public is legally prohibited. As the Supreme Court of Canada held in its decisions on *R. v. Keegstra* and other cases three decades ago that, although the Criminal Code prohibition of hate propaganda (s.319(2)) is an infringement of the freedom of expression, this infringement is justified under s.1 of the Canadian Charter of Rights and Freedoms.

(2) *Recognize Canada’s obligation under the ICERD*. Canada ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1970, which stipulates that all state parties should “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination” (Article 2, paragraph 1 (d)). Therefore, using the law to prohibit racial discrimination, including racist hate crimes no matter whether or not they incite violence, is not only legal under Canadian law but also a treaty obligation under the ICERD. Ratified by 182 state parties, the ICERD principles and norms are considered universally recognized rules to fight racism. As the European Commission against Racism and Intolerance has pointed out, hate speech, even if it does not explicitly advocate the use of force, contributes to hate crimes and leads to acts of violence and conflict on a wider scale. Acting under article 14 of the ICERD, the UN Committee on the Elimination of Racial Discrimination in its 2005 decision on *The Jewish community of Oslo et al. v. Norway* held that the prohibition of the expression of “all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression”.

- (3) *A general legal definition of hate crime in the Criminal Code.* The International Association of Prosecutors together with the OSCE/ODIHR has developed a practical guide for prosecuting hate crimes based on the laws of 57 countries in Europe and Asia. The guide defines a hate crime as an act that is prohibited under criminal law and motivated by prejudice based on a specific characteristic of the victim. This general definition has two elements: the base offence and the bias motivation. Therefore, any criminal offence can become a hate crime when is committed because of a legally defined category of hatred, including hate towards a race or ethnic group. Hate motivation is often demonstrated in a verbal or written hate statement, use of hate slogans or slang, display of hate symbols or signs, or particular patterns of hate crimes.
- (4) *Criminalization of racist hate speech causing disturbance of public peace.* It is interesting to study the controversies regarding the repealed section 13 in the Canadian Human Rights Act that was “Canada’s only federal civil hate speech provision” and the ongoing legislative development to introduce Bill C-36, “An Act to amend the Criminal Code and the Canadian Human Rights Act and to make related amendments to another Act (hate propaganda, hate crimes and hate speech)”. However, there are legislative models that can be considered as options better than Bill C-36 because of their clarity and inclusiveness. Criminalization of racist hate speech causing disturbance of public peace must go beyond “hate propaganda.”
- An excellent model is found in the Public Order Act 1986 of U.K., which has a designated Part III for racial hatred offences. Under section 18 of the Act, it is a criminal offence if a person uses threatening, abusive or insulting words or behaviour, or display of such written materials, and the acts are intended or likely to stir up racial hatred, no matter if the offence is committed in a public or private place, unless the acts are committed by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling. (Endnote 2.)
- Another excellent model is Article 130 Incitement of Masses in the German Criminal Code (Endnote 3). This article targets incitement of hatred in a manner which is suitable for causing a disturbance of the public peace. And it not only provides a clear definition of the offence but also applies it to online distribution of hate materials.
- (5) *Making better use of s.319.* Before the Criminal Code is amended, if interpreted properly, the specific definitions of public incitement of hatred and willful promotion of hatred under s.319 should cover all forms of racist hate speech causing disturbance of public peace. They need to be properly interpreted and better used in practice.
- (6) *Better use of other CCC crime definitions.* Under the Canadian Criminal Code, expression of racist hatred without referring to the use of violence may be prosecuted as a criminal offence if it fits the definition(s) of public disturbance, mischief, and defamatory libel. These provisions in the Criminal Code should be fully used in combating hate crimes.
- (7) *Unified guidelines for policing and improved policies for prosecution.* According to a study conducted by the Department of Justice Canada, different police forces in Canada use different definitions and guidelines regarding hate crimes, and it is not clear if all major police forces have a hate crime definition and guidelines.
- (8) *More training of police, prosecutors, lawyers, legal aid and victim’s service providers.* The IAP and OSCE/ODIHR Practical Guide for prosecution and training program on hate crimes for law enforcement are good examples for consideration. Ideally, each major

police force should set up a specialized hate crime unit. And we should have designated prosecutors with specialized knowledge for the handling of hate crime cases. Lawyers, legal aid and victim's service providers should also receive training to help victims of hate crimes.

- (9) *Improve statistics and analysis.* In 2020, the Anti-Hate Crime Community Leaders Working Group recommended that the Attorney General should publish an annual report on hate crime cases that requested his/her consent according to the CCC and the results in these cases. We indeed need better crime statistics to assess the dimensions and typologies of racist hate crimes, including better official data of police recorded hate crime cases, prosecuted cases, conviction and sentencing data, and victims survey data.
- (10) *Public education on combating racism and hate crimes and development of community engagement-support initiatives.* We need to develop and deliver public education programs to raise the awareness, engage the communities, and improve the monitoring, reporting and prevention of hate crimes. It would be a good practice to incorporate lessons on racial equality, racism and hate crimes in standard school curriculums. New immigrants should receive education of Canadian values, principles and norms of fundamental rights and freedoms, and the basics of the Canadian justice system.

Much more can be done to fight racism and hate crime. For example, we should consider the Department of Justice 2015 set of recommendations to improve our response to hate crimes in Canada. The federal government has been implementing its Anti-Racism Strategy. The Government of BC has launched several initiatives to fight racism. Let us hope that all these important initiatives progress well and we will soon be witnessing the results.

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Endnotes

1. Anti-Asian hate incidents in Richmond, BC

A 2019 incident. It happened in a public parking lot outside of a busy shopping mall. Lady A loudly and repeatedly yelled at lady B (a Chinese immigrant) who was with her 6-year-old kid "Chink", "F", and "Go back to China". It was because A parked her car over the line of the marked parking space and hit B's car on the other side of the line, and B told A she didn't park the car properly. B recorded the incident and reported it to the RCMP. Thousands in the local community were furious after seeing her video footage of the incident on the internet. But the RCMP decided not to press a charge because it was considered an "incident" only, not a crime. Here is a news story with a video footage:

<https://www.vancouverisawesome.com/local-news/racial-slurs-metro-vancouver-comments-1945385>

A 2020 incident. This incident happened in a Richmond cafeteria. A and B were asked by a waitress to sit at another table because they were sitting too close to the customers at a table nearby, and it was to follow the indoor social distancing rules of BC. They slashed their coffee on the ground and spilled the remaining coffee on the waitress and yelled at her. When the shop manager and the waitress followed them outside the cafe and asked them to wait for the police, A repeatedly yelled "F Chinese" at them. An RCMP officer arrived in time, stopped them, watched the security camera and cell phone footages, recorded the incident and took B to the RCMP detachment. Thousands in the local community watched the footages and demanded the police and the crown to take legal action. The crown pressed a charge of mischief. Now the case is still in the BC court. After his first appearance in court, A announced in public outside the courthouse: we welcome the Germans and the French but we don't want the Chinese... Later, it was found that there was a video recording of A yelling at a Chinese lady in a public place in 2019 "Go back to China" when the lady reminded him that he should not wash his car there because it was not a designated car wash place ... Here is a story with a video footage:

<https://globalnews.ca/news/7960632/two-charged-alleged-racist-incident-richmond-bc-cafe/>

It is interesting to compare the cases with a previous case in BC. In 2016, a BC man Corbettin was caught on film spewing racial slurs at a South Asian lawyer Duhra in a parking lot in Abbotsford. He was charged of mischief, public disturbance, and because of his "aggressive demeanour" of verbal abuse against the victim, assault. Corbettin later plead guilty to assault and was sentenced to a two-month conditional sentence and one year of probation.

<https://www.peninsulanewsreview.com/news/b-c-man-filmed-in-racist-parking-lot-rant-gets-curfew-pr>

2. Public Order Act 1986 of U.K.

Part III Racial Hatred

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PART III RACIAL HATRED

Meaning of “racial hatred”

17 Meaning of “racial hatred”.

In this Part “racial hatred” means hatred against a group of persons **F1**. . . defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

Acts intended or likely to stir up racial hatred

18 Use of words or behaviour or display of written material.

(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed,

by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme [F3included in a programme service].

3. The German Criminal Code definition of hate speech crime

Section 130 Incitement of masses

(1) Whoever, in a manner which is suitable for causing a disturbance of the public peace,

1. incites hatred against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them or
2. violates the human dignity of others by insulting, maliciously maligning or defaming one of the aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population

incurs a penalty of imprisonment for a term of between three months and five years.

(2) Whoever

1. disseminates material (section 11 (3)) or makes it available to the public, or offers, supplies or makes available to a person under 18 years of age material (section 11 (3)) which
 - a) incites hatred against one of the groups referred to in subsection (1) no. 1, sections of the population or individuals on account of their belonging to one of the groups referred to in subsection (1) no. 1, or sections of the population,

b) calls for violent or arbitrary measures against one of the persons or bodies of persons referred to in letter (a) or

c) attacks the human dignity of one of the persons or bodies of persons referred to in letter (a) by insulting, maliciously maligning or defaming them,

2. makes content referred to in no. 1 (a) to (c) available to a person under 18 years of age or to the public through broadcasting or telemedia services or

3. produces, purchases, supplies, stocks, offers, advertises or undertakes to import or export material (section 11 (3)) of such content referred to in no. 1 (a) to (c) in order to use it or parts obtained from it within the meaning of no. 1 or 2 or to facilitate such use by another

incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(3) Whoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of Crimes against International Law in a manner which is suitable for causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding five years or a fine.

(4) Whoever publicly or in a meeting disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(5) Subsection (2) no. 1 and no. 3 also applies to material (section 11 (3)) of such content referred to in subsections (3) and (4). Whoever makes content referred to in subsections (3) and (4) available to a person under 18 years of age or available to the public through broadcasting or telemedia services incurs the same penalty specified in subsection (2) no. 2.

(6) In the cases under subsection (2) nos. 1 and 2, also in conjunction with subsection (5), the attempt is punishable.

(7) In the cases under subsection (2), also in conjunction with subsection (5), and in the cases under subsections (3) and (4), section 86 (3) applies accordingly.