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The Legal and Societal Perils of Introducing the Concept of Anti-Palestinian Racism in Canada

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Abstract

Several civil society groups in Canada advocate for adopting the concept of Anti-Palestinian Racism (APR). However, there are significant flaws in both its concept and definition, as well as legal and societal risks in its adoption. APR seems more focused on advancing a political agenda and undermining the core identities of most Jews than addressing discrimination against Palestinians. This paper examines the legal and social implications of recognizing APR as a form of racism, particularly within Canadian universities or colleges. It argues that APR is a political advocacy tool, not a legal framework to combat racism, uniquely targeting Zionism and contradicting efforts to fight antisemitism. APR also confuses discrimination based on national or ethnic origin with racism, despite existing laws protecting against such discrimination.

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Additionally, APR undermines freedom of expression and threatens academic freedom by dictating the outcomes of political discussions.

Keywords

Anti-Palestinian discrimination – Antisemitism – Human rights law – Zionism – Canadian Charter of Rights and Freedoms

1 Preamble: A Commitment to Fairness, Inclusion, and Respect

To be clear at the outset, the authors are committed to genuine fairness, inclusion and respect for the dignity of all people, including Palestinian people, as enshrined in the *Canadian Charter of Rights and Freedoms*. Subsection 15(1) of the *Charter*[1] states 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 and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Objections to or criticisms of APR should in no way be interpreted as an attempt to deny or abrogate the protections accorded to Palestinian Canadians under Canadian law or their ability to fully participate in and enjoy the same freedoms and rights afforded to all Canadians. The protected grounds, whether based on "ancestry," "place of origin", "national or ethnic origin" includes protection for those of Palestinian origin (and for those of any other national or ethnic origin) from discrimination.

2 Perils of the Arab Canadian Lawyers Association Definition of Anti-Palestinian Racism

Several organizations including the Arab Canadian Lawyers Association, Canadians for Justice and Peace in the Middle East,[2] the Canadian Muslim

1 *Canadian Charter of Rights and Freedoms*, s 2 (b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 Canadians for Justice and Peace in the Middle East (CJPME) works exclusively on Palestinian issues and advocates for APR as well as Boycott, Divestment and Sanctions (BDS) against Israel.

Public Affairs Council, and Independent Jewish Voices (IJV)[3] have advocated for a definition of anti-Palestinian racism (APR) as developed by the Arab Canadian Lawyers Association (Majid, 2022). Whether explicitly mentioned or not by APR's advocates, the *de facto* definition of APR is the one listed in the document "Anti-Palestinian Racism: Naming, Framing, and Manifestations" published by the Arab Canadian Lawyers Association (Majid, 2022), which states:

> Anti-Palestinian racism is a form of anti-Arab racism that silences, excludes, erases, stereotypes, defames or dehumanizes Palestinians or their narratives. Anti-Palestinian racism takes various forms including: denying the Nakba and justifying violence against Palestinians; failing to acknowledge Palestinians as an Indigenous people with a collective identity, belonging and rights in relation to occupied and historic Palestine; erasing the human rights and equal dignity and worth of Palestinians; excluding or pressuring others to exclude Palestinian perspectives, Palestinians and their allies; defaming Palestinians and their allies with slander such as being inherently antisemitic, a terrorist threat/sympathizer or opposed to democratic values.

3 The ACLA APR Definition is a Political Advocacy Tool not a Legal Basis for Discrimination

The way APR is defined by ACLA is fundamentally flawed because it explicitly imports a definition of identity that *requires* all Canadians to adhere to a set of political beliefs, historical facts, and narratives dictated by ACLA. This would wrongfully extend human rights law to the protection of assertions that are deeply contested among well-informed and sincere advocates of multiple viewpoints. The ACLA APR also seeks to render unlawful a series of behaviors that are protected by the *Charter* and provincial human rights codes. More specifically, it seeks to render a person's right to hold opinions that conflict with Palestinian narratives as articulated by ACLA as discriminatory and attempts to confer rights protection to the very narratives themselves.

3.1 *A. No Evidence for a Need for an APR Definition*

By the Arab Canadian Lawyers Association's own admission, its "… research at that time [i.e, February 2021] did not reveal any studies that explained the term APR or analysed its framework." Thus, ACLA, a small, Canadian-based

3 Independent Jewish Voices (IJV) is a group that is often tokenized as representing the broader Jewish community. A recent study showed that the views of IJV represents less than 3% of Canadian Jewry (Brym 2024) although given disproportionate voice in media.

organization with a history of anti-Israel activism, created a definition and a framework for a concept that had no historical precedent or evidence-based justification.

Despite APR's origins and lack of proper review and stakeholder consultation, it was recently officially adopted by the Toronto District School Board[4] as part of its anti-racism strategy without developing any particular definition and without rejecting the only existing definition.[5] Calls for the adoption of APR have also been made to the House of Commons Justice Committee studying antisemitism and anti-Muslim bigotry and were part of the demands of those who organized encampments on university campuses during the spring and summer of 2024. A media campaign was also launched, to inform the public of the rationale, necessity, and importance of adopting and implementing APR.[6]

Contrast the development of ACLA APR with the robust, methodical, sustained multi-year, multi-stakeholder process that led to the development of the International Holocaust Remembrance Alliance's working definition of antisemitism (IHRA[7]), which included national consultations in Canada prior to its adoption as Canada's consensus definition. IHRA has emerged as the internationally accepted, non-legally binding definition of antisemitism. IHRA draws on the rich and complex scholarship of antisemitism, which traces the continuity and changes in antisemitism over time from the ancient period until the present day in diverse geographical and cultural locales (Katz, 2022). IHRA has also been adopted or endorsed by 44 countries, (as well as a number of Canadian provinces), the United Nations, the European Union, the Global Imams Council, Muslims Against Antisemitism (UK), the Council of Europe and by numerous universities and organizations. IHRA has undergone significant iterative reviews and is entirely compatible with the accepted definition of discrimination under Canadian federal and provincial antidiscrimination laws. In contrast, according to ACLA's own one-time, limited consultation with 60 individuals and organizations, not all of whom responded, APR was deemed by 52.9% of respondents as in need of improvement before making it public and by 11.8% as not needed (see Appendix 1 of "Anti-Palestinian Racism: Naming, Framing, and Manifestations").

4 https://www.cbc.ca/news/canada/toronto/tdsb-anti-palestinian-racism-board-vote-1.7240178.

5 The Board adopted APR despite an effort by the Director of Education to table the internal report supporting its inclusion for further consideration. The Board also rejected a motion to adopt anti-Israeli racism as part of its strategy in the light of APR's inclusion.

6 https://www.antipalestinianracism.com/.

7 https://www.canada.ca/en/canadian-heritage/services/canada-holocaust/antisemitism/handbook-definition-antisemitism.html#a4d.

Anti-Israel detractor groups, including ACLA, have persistently repudiated Canada's consensus adopted definition of antisemitism by falsely alleging that IHRA is the product of a flawed process that silences criticism of Israel. And yet, these same groups are now cynically proposing a vastly more expansive, coercive, and corrosive definition than any existing definition of discrimination, which is demonstrably the result of an inadequate process. Their repudiation of IHRA also minimizes or ignores altogether its explicit insistence that criticism of Israel of the same type levelled against other countries is not antisemitic.

3.2 *B. The de facto APR Definition: Centring Jewish Identity as Racism*

> The right to swing my fist ends where the other man's nose begins.
>
> OLIVER WENDELL HOLMES JR

The development of tools to combat racism and discrimination should reflect an ethos of seeking to create a just society free of bigotry and hate that encourages inclusion and harmony among diverse peoples as well as that seeks peaceful coexistence. Remarkably, ACLA's definition of APR unconscionably undermines this philosophy and the work against racism by directly pitting one identity group against another. This makes APR uniquely injurious to the vast majority of Jews and to Israeli Canadians, distinguished by race, religious, creed, national or ethnic origin (depending on the analysis) and thus deserving of human rights protection. In addition to essentially defining Zionism as one manifestation of APR, ACLA's definition imputes racism to differing historical and political interpretations of the formation of the State of Israel, and as mentioned above effectively defines the Government of Canada's definition of antisemitism, the IHRA definition, as an expression of APR.

Zionism, which is defined as the right of the Jewish people to self-determination in their ancestral homeland, is central to Jewish identity (Engel, 2009). Jewish Canadians across all denominations, from secular to religious, are overwhelmingly Zionist[8] (Brym, 2024). Zionism encompasses Jewish historic, religious, and cultural ties to the land of Israel.[9] While Zionists hold

8 Whereas Israel is a Jewish State, Israel's Declaration of Independence states that Israel will "uphold the full social and political equality of all its citizens, without distinction of race, creed or sex; will guarantee full freedom of conscience, worship, education and culture; will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions."

9 Zionism has its roots in the term Zion from the Hebrew Bible which refers both to Jerusalem specifically and to Eretz Israel, the land of Israel as a whole.

a wide range of political perspectives, Zionism, at its core, reflects a shared connection that is deeply embedded in Jewish practice, thought, culture and history. If adopted, the ACLA's definition of APR (or similar definitions based on it) will effectively codify a claim that Jewish identity is racist by erasing the Jewish people's more than 3,000-year-old religious, spiritual, and cultural connection with the land of Israel.[10] Legitimate definitions of discrimination should serve to prevent discrimination, not promote it as the APR definition does.

As the Oliver Wendell Holmes Jr. quote cited above suggests, the parameters of any supportable definition of discrimination should end, at a minimum, where they legitimize the right to promote hated of protected groups. The APR definition institutionalizes antisemitism by equating Zionism, a central feature of Jewish identity for most Jews, with racism. In doing so, the APR definition asserts a positive right to hate, setting the stage for discrimination against most of the Canadian Jewish community. This is not (and should not be) a feature of any definition of racism.

This is not the first time that groups have attempted to define Zionism as racism. In the 1970s, the Soviets were world leaders in the campaign to designate Zionism as racism and deny Jewish Soviet citizens the right to practice their religion and culture freely. In 1975, led by the USSR with the support of its allies, the United Nations (UN) passed General Assembly Resolution 3379, which, "Determines that Zionism is a form of racism and racial discrimination." UN Resolution 3379 was ultimately revoked through the passing of UN Resolution 46/86 in 1991, but the Soviets and their allies continued their decades long campaign against Zionism. In fact, political Zionism is a concept consistent with other legitimate national sovereignty movements that emerged during a historic era of the dissolution of empires in favour of nation states. It is revealing, of course, that the claim that Zionism is unlike other national movements and is uniquely racist originated in the USSR, one of the most repressive and antisemitic regimes of the twentieth century (Tabarovsky, 2017; Kosharovsky, 2019). The Soviet Union engaged in other antisemitic campaigns against its own citizens during these same decades and the influence of that work is still felt across the world.

10 That the authors of the APR definition in their report (Majid, 2022) make the claim that Israel is a settler-colonial state is antisemitic in effect because it erases the Jewish people's millennia long history and connection with the land of Israel and associates Zionism with settler-colonialism, which is widely cast as a malevolent endeavour (see IHRA Handbook, Illustrative, "Example 7: Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.").

3.3 *C. Identity Premised on Contested Historical Accounts*

The APR definition states that, "Denying the Nakba and justifying violence against Palestinians" is racist. As indicated above, the proposed definition of APR necessarily imports a coercive presumption of shared historical narratives. These begin with a definition of the Nakba itself.

According to the ACLA: "the Nakba ("catastrophe" in Arabic) refers to numerous historical accounts: 1) "the ethnic cleansing of Palestine that led to the creation of the state of Israel in 1948"; 2) "the ongoing persecution, expulsion and occupation of Palestinians," and 3) "the denial of the Palestinian right of return to their homes." In its report, the ACLA recognizes that there is significant disagreement as to the meaning accorded to the term "Nakba" within Palestinian and Arab communities. There is also a lack of shared consensus with other communities. The ACLA treats their account as historical fact even though experts dispute these narratives based on evidence including the fact that Israel is a legitimate country recognized under international law. This militates against the assertion that denying the "Nakba" constitutes racism.

The following summarizes key disagreements regarding the term Nakba, its historical significance, and the political arguments that rely on a particular understanding of the term: "Nakba."

Nakba is not a neutral term; it conveys a particular perspective on the history that led to the formation of the State of Israel: According to many experts, the term, Nakba, is regularly used to describe not just the displacement of Palestinian civilians, but also the delegitimization of the creation of the Jewish State itself. It is an advocacy tool employed by historical revisionists to malign Israel as an illegitimate state rather than a sovereign nation recognized under international law. In addition, the "Nakba" narrative ignores the role of the invading Arab armies in causing the war and mass exodus of Palestinians, and the concomitant expulsion of more than 750,000 Jews by Arab states.[11] It also fails to acknowledge that had the Palestinians accepted the 1947 UN partition plan (General Assembly Resolution 181), they would have had a Palestinian state. Moreover, it ignores the fact of other well documented and extensive displacement of peoples of various origins in the 20th century due to conflict and the reorganization of polities from empires to nation states. Such movement of people due to conflict was even considered desirable to reduce conflict and was recognized as legal under international law.

11 Interestingly, the expulsion of Jews from Arab countries after 1948 is referred to by some Arabic speaking Jews as the *Jewish Nakba*.

The assertion that the Nakba was the proximate cause for the formation of the State of Israel is sharply contested by scholars, community members and political analysts: While proponents of APR may rely on one narrative of this history, this viewpoint is sharply contested among scholars, political analysts across national and ethnic lines, and among Jewish community members. The latter individuals understand the Nakba narrative as a strategic attempt by detractors to invalidate the creation of the state of Israel. Instead, for example, scholars and experts point to the formal establishment of the State on May 14, 1948, the day the British Mandate expired and the State of Israel was formally established in one region of what was known previously as the British Mandate for Palestine. This followed the UN General Assembly Resolution 181 (1947).

Scholars and political experts link the demand to recognize the Nakba with the demand to recognize the right to return of all Palestinians and their descendants to the state of Israel.[12] This claim does not correspond to any similar claim by refugees displaced in other national conflicts nor is it an inalienable right recognized in international law. No sovereign state is required to recognize such claims. To assert that a definition of racism must include one particular resolution to a decades old conflict is highly controversial. It would mean *inter alia* that any assertion of Zionism, or the principle of an independent, sovereign Israel, is inherently racist. Thus, this aspect of APR obviates debate by asserting that one side's position is legitimate while the other's position is foundationally racist. Beyond the Israeli-Palestinian conflict, agreeing with this part of the APR definition implies that any party with a territorial dispute could claim that opponents are racist and should not have the ability to even express their point of view. There is no other definition of racism that makes any such claim.[13] Given the continuing differences over the meaning of the term "Nakba" and its political implications, predication of racism on the acceptance of the ACLA definition of APR appears intentionally coercive.

3.4 *D. Expressions of Jewish Identity May Lead to Charges of Hate Speech*

While the ACLA's framework purports to address APR, its implications risk criminalizing expressions of Jewish identity that align with Zionist beliefs. Furthermore, as discussed above definitions of discrimination should protect

12 This link has become increasingly explicit since the 1993 Oslo Peace Accords. Palestinian journalist and activist, Baroud Ramzy describes this essential link (Baroud, 2022). Also see Al-Hardan, 2012.

13 See Ontario Human Rights Commission fact sheet's discussion of racialization https ://www3.ohrc.on.ca/en/racial-discrimination-race-and-racism-fact-sheet and Canadian Human Rights Commission's outline of discrimination what-discrimination.

individuals while fostering social cohesion and coexistence. They should not encourage divisiveness or prioritize any particular group's narratives or perspectives on contested historical events. Unfortunately, APR pits the Palestinian narrative against the Zionist narrative. Ambiguity remains about whether expressions of Jewish identity, in particular, Zionism might lead to charges of hate speech as articulated under Section 319 of the *Criminal Code* should APR be adopted.[14] Labeling parts of Jewish identity as "racist" might, by implication, lead to allegations that such expressions of Jewish identity wilfully promote hatred against Palestinians.

To be clear, we are not suggesting that the expression of support for Zionism could, in law, amount to the wilful promotion of hatred. The Supreme Court of Canada in *R. v. Keegstra* held that the word "hatred" as it relates to hate speech "must be construed as encompassing only the most severe and deeply felt form of opprobrium."[15] Moreover, the wilful promotion of hatred must be directed against an identifiable group. It is untenable to say that the mere expression of support for Zionism, properly understood, constitutes the promotion of hatred or hatred directed against Palestinians, particularly when it is compatible, for many, with Palestinian self-determination. The offence also provides for defences rooted in good faith, religious belief, and matters of public interest,[16] likely applicable to the expression of support for Zionism. However, the point here is that adoption of a definition of racism that necessarily includes the expression of support for Zionism may fuel an allegation that racist speech is *a fortiori* hate speech, and accordingly, invites consideration of criminal sanction. The risk of such an allegation would inevitably lead to a chilling effect on freedom of expression and academic freedom, particularly in a university and college context.

3.5 *E. Additional Comments about ACLA's Definition of APR*

The ACLA definition of APR states that, "Erasing the human rights and equal dignity and worth of Palestinians" is racist. Attempts to undermine the human rights and equal dignity and worth of Palestinians in Canada would clearly violate human rights laws. The authors unequivocally agree that this is discriminatory. However, the inclusion of this statement in the definition of APR is therefore redundant with existing laws.

14 Section 319 of the Criminal Code of Canada criminalizes public incitement of hatred against an identifiable group likely to lead to a breach of the peace and the wilful promotion of hatred towards any identifiable group.

15 R v. *Keegstra*, [1990] 3 SCR 697.

16 *Criminal Code*, RSC 1985, c C-46, s.319 (3).

The definition of APR states that, "Excluding or pressuring others to exclude Palestinian perspectives, Palestinians and their allies" is racist. Once again, this statement coerces Canadians to adopt and use narratives that are contested. In the context of academia, it forces a viewpoint that may be at odds with evidence. Moreover, discrimination definitions are meant to protect people rather than specific viewpoints. APR focuses on the protection of certain narratives, which is not the purview of a definition of discrimination.

The definition of APR states that, "Defaming Palestinians and their allies with slander such as being inherently antisemitic, a terrorist threat/sympathizer or opposed to democratic values" ("Anti-Palestinian racism is a form of anti-Arab racism that silences, excludes, erases, stereotypes, defames or dehumanizes Palestinians or their narratives."). The authors agree that imbuing all Palestinians and their allies with the negative characteristics outlined in this part of the APR definition is discriminatory. However, this or similar language has been used by some to characterize as racist legitimate condemnation of acts of violence committed by, condoned or supported by segments of the Palestinian community. Many activists would characterize the criticism of the Hamas attack on October 7th or expressions of support for the self-defence of Israel as constituting APR.

In summary, the ACLA APR definition is a form of political advocacy forcing a single narrative regarding the "Nakba" that is highly contested; anyone who denies ACLA's specific understanding is consequently labelled racist. In addition, the ACLA APR framework claims that Zionism, a central component of Jewish identity for most Jews (Brym, 2024), is a key driver for anti-Palestinian racism in Canada (Majid, 2022). In the implementation of the APR definition, any person who is a Zionist or believes in the Zionist idea that Israel has the right to exist as a Jewish state or uses the term "Nakba" in reference to Jewish diasporic and Israeli accounts, will be deemed as racist and may be at risk of being charged with violating hate speech laws.

4 APR Confuses Discrimination on the Basis of National or Ethnic Origin with Racism and is Unnecessary Due to Existing Laws

Human Rights scholars and lawyers recognize that "race", "ethnic origin", "national origin" "creed and "religion" intersect. It is not always easy to categorize forms of discrimination for the purposes of *S.* 15 Charter protection or enforcement of provincial human rights statutes. However, it is highly doubtful that discrimination against Palestinians is accurately described as racism, as opposed to discrimination based on national or ethnic origin.

Palestinians are not a race, any more than Israelis, Ukrainians, or Canadians constitute a race. The Government of Canada's 2024 Anti-Racism Strategy[17] appropriately does not characterize discrimination based on national origin as racism. Not all forms of discrimination constitute "racism" in law and the proposal to create a special category for one group is not contemplated by the *Charter* or provincial human rights laws. Importantly, discrimination based on national or ethnic origin are already fully protected under both *S.* 15 of the *Charter* and under Canadian and provincial human rights legislation. The characterization of anti-Palestinian discrimination as racism demonizes others deserving of protection as well as diminishes and dilutes anti-racism in a way that benefits no one, including Palestinians who do experience discrimination. Equally problematic, as mentioned above ACLA's own definition of APR shows that rather than reflecting a genuine concern about discrimination against Palestinians it is constructed as a tool to pre-emptively settle contentious political debates and suppress pro-Zionist expression. Human rights legislation does not exist to provide a platform for settling political debates or for furthering hate, rather than combatting it.

To be clear, this is not to say that Palestinians (like Syrians, Israelis, Ukrainians) are not exposed to unique manifestations of discrimination based on their national origin. However, the response is to address this discrimination through the statutory tools and anti-discrimination policies that already exist in Canada, not by inaccurately categorizing Palestinians as a race, and discrimination against them as racist. This is not merely an academic debate. As discussed above, the ACLA and others have deliberately chosen to frame discrimination against Palestinians as racism to demonize the vast majority of Jews and Israelis (both protected groups) as racists thereby suppressing their freedom of expression. Thus, treating the Palestinian experience as a form of racism is problematic because it creates an untenable distinction between the treatment of Palestinians and others who have experienced discrimination based on their national or ethnic origin.

4.1 *A. ACLA Defines Anti-Palestinian Racism as a form of Anti-Arab Racism*

Throughout the history of Canada. numerous groups have experienced discrimination based on their national origin: for example, immigrants from Ireland (e.g., Scott, 2000) in the mid-nineteenth century and Italy (e.g., Zucchi,

17 https://www.canada.ca/en/canadian-heritage/services/combatting-racism-discrimination/canada-anti-racism-strategy.html

1998) in the twentieth century. The *Charter* and provincial human rights legislation protect persons from discrimination on the basis of place of origin. Canadian law does not attempt – with good reason – to define all forms of discrimination based on place of origin. Nor should we start defining certain forms of discrimination based on place of origin, but not others. This would create a hierarchy of protected groups based on place of origin. This would be equally true if we start defining certain forms of discrimination based on ethnic origin.

More problematic, the definition advanced by ACLA effectively defines APR in terms of political ideology. ACLA's report is based on a tendentious claim – which most experts would contest– that "[i]t is widely accepted that Palestine-Israel is fundamentally a settler-colonial struggle where Palestinian lands are seized and occupied by Israel in accordance with their political ideology of Zionism" (Majid 2022, p. 21). APR would involve the unprecedented recognition of an entirely new ground of discrimination – one based on political advocacy *vis à vis* the Israeli state and its founding principle of Zionism. If disagreement about Palestinian nationalism is a form of racism, then similar arguments could be made that political disagreements over Sikh, Chinese, Ukrainian, or Kurdish national claims are racist.

As the following discussion illustrates, this approach is also problematic because: 1) there is no verifiable data submitted as evidence as to the extent to which Palestinian persons living in Canada experience discrimination specifically based on their Palestinian national origin as *distinct* from their Arab[18] or Muslim identities, 2) the call to treat anti-Palestinian discrimination as racism also unjustifiably differentiates between Palestinians and a wide range of Arab subgroups and other groups distinguished by ethnic origin. If anti-Palestinian discrimination is defined as racism, then so too should be anti-Israeli racism, anti-Canadian racism, etc.

4.2 *B. Discrimination Against Palestinians in the Arab World and the West*

Despite sharing linguistic, cultural, ethnic, and religious ties with other Arab populations, there is good reason to presume that Palestinians, like other Arab subgroups, face unique intolerances in both Middle Eastern and Western countries based on their place of origin. Within Arab dominant Middle Eastern countries, Palestinian people have been shown to suffer from discrimination in employment, citizenship, and accommodation (i.e., in Lebanon, Egypt,

18 The same holds true for Palestinians who are neither Arab nor Muslim.

and Syria).[19] Yet, the origins and effects of that discrimination, which suggest some distinction of experience, bear no resemblance to the definition of APR proposed by ACLA, which as previously mentioned appears to be motivated by political advocacy in the form of animus toward Israel rather than addressing discrimination against Palestinians. Even if it were not so, existing anti-discrimination laws in Canada are sufficient to accommodate differential experiences of discrimination experienced by sub-groups of Arabs or others distinguished by national or ethnic origin, obviating the need for a specific definition of APR.

Within Western countries including Canada, there is scholarship that demonstrates that, post-9/11, Palestinian people also suffer from discrimination that is common to, not distinguished from, other ethnic groups with places of origin in the Middle East (e.g., Bowler, 2017; El-Abed, 2008; Kurtoğlu et al., 2023). This commonality of discrimination provides no rationale for defining anti-Palestinian discrimination, and not defining the discrimination experienced in common by other groups similarly situated. Accordingly, whether we focus on commonality of discrimination faced by groups based on national or ethnic origin, or on the fact that each group may experience discrimination in unique ways, the result is the same. Existing anti-discrimination laws are sufficient to address such discrimination, and the proposed APR definition is not informed by the experiences of discrimination of Palestinians in Canada. It is instead a definition that coerces the political viewpoints of its proponents.

The ACLA APR claims that anti-Palestinian conduct constitutes a form of anti-Arab racism. This claim undermines ACLA's advocacy for APR. In Canada, the Palestinian experience is often presumed to be the product of anti-Muslim bigotry or anti-Arab racism. Stated another way, there is no verifiable data submitted as evidence as to the extent to which Palestinian persons living in Canada experience discrimination specifically based on their Palestinian national or ethnic origin as *distinct* from their Arab[20] or Muslim identities. To the extent that the presumption is accurate, that is, that Palestinians experience racism because they are, or perceived to be Arabs and/or Muslims, such racism is already well-recognized and referenced in Canada's anti-racism strategy. This provides an even more compelling argument why APR should not bear its own definition.

19 See Fekete, 2011 for an account of the "common sense" racist conflation of Muslim and Arab identities in Europe post 9/11 while Arat-Koc S., 2005 argues similarly that post 9/11 European Muslims/Arabs have been "jettisoned" from Western Civilization.

20 The same holds true for Palestinians who are neither Arab nor Muslim.

4.3 *C. Equal Treatment of all Sub-Groups in Anti-Racism*

The manner in which APR is defined by ACLA is problematic because it alters the way in which anti-Arab discrimination will be recognized for the 450 other ethnic or cultural origins identified in the 2021 Census. Presumably so would the experience be of any number of enumerated Arab or Muslim sub-groups. Of the 694,000 people who identified being Arab in the 2021 census, 29% provided no further clarification of their ethnic or cultural origins; 15.3% identified as "Lebanese", 9.3% as "Egyptian", 8.8% as "Moroccan" and 8.8% as "Syrian". These reports indicate that Lebanon, Egypt, and Morocco are source countries for immigration of those who identify as Arab but also reflect their national origin identities. Reports that each of these groups experience unique forms of prejudice in Canada rationalizes recognizing their experience as unique forms of discrimination. For example, studies of the treatment of Syrian refugees in migration and resettlement indicate a unique experience with prejudice in relation to obtaining accommodation and employment (Scott & Safdar, 2017). Any number of sub-groups can identify their experience as a unique form of discrimination without a need for an explicit definition of each form and certainly without conflating discrimination based on national or ethnic origin with racism.

Identifying the unique experience of numerous sub-groups in Canadian society is not in and of itself problematic. Such an analysis provides important insights into how multiple facets of one's identity leads to unique experiences with discrimination. However, such an analysis does not necessitate a definition for each experience but rather can be used to support the application of existing legislation relevant to protecting Canadians from all forms of discrimination.

Obtaining evidence-informed data on the unique experiences of different groups is especially cogent in university spaces which must establish a safe and effective learning and working environment for all students, faculty and staff and must marshal limited resources on the basis of evidence-based claims. Without good data it would be impossible for universities to develop policies, strategies, allocate resources, or navigate competing claims from diverse groups who experience racism and other forms of discrimination.

5 APR Undermines Freedom of Expression and Academic Freedom

Human rights protections are grounded in a wide array of philosophical, legal, and ethical frameworks that aim to recognize and uphold the inherent dignity and worth of every individual. Human rights protection in universities ensures that all members of the university community – students, faculty, staff, and

administrators – can exercise their fundamental rights and freedoms in a safe, inclusive, and respectful environment. Human rights protections ensure the capacity of universities to offer the following protections in an equal and equitable manner. APR infringes on these rights and freedoms in significant ways:

5.1 *A. Central Precepts of APR*

As articulated above, we assert that, if adopted, the Arab Canadian Lawyers Association's definition of APR (ACLA APR) or any similar definition would run afoul of several laws, including the *Canadian Charter or Rights and Freedoms* and provincial human rights codes. More urgently, ACLA APR has specific detrimental effects in the context of institutions of higher education that will also be discussed because of the concerted efforts by groups to advocate for its adoption as part of Equity, Diversity, and Inclusion frameworks at institutions of higher learning.

5.2 *B. APR Violates Freedom of Expression*

Universities uphold the right to freedom of expression, allowing students and faculty to express their opinions and ideas freely, even if controversial or unpopular. This includes the right to engage in peaceful protest and dissent.

On the one hand APR guarantees protection of those who call for the destruction of the State of Israel as "freedom of expression" while, on the other hand, does not allow for any legitimate criticism of the Palestinian narrative including various highly contested political views (e.g., denying the "Nakba"). This sets up a double standard whereby one set of political beliefs is prioritized at the expense of another. University campuses are meant to be places where opposing viewpoints can be aired, even when they are considered offensive by some as long as they do not cross the threshold of hate speech, incitement to violence, or break codes of conduct. On campuses, APR would effectively restrict open and respectful dialogue that explores competing narratives using facts and arguments. It would also restrict interrogation of various points of view, which would be a serious threat to the mission of the university to advance knowledge and seek truth. This is a clear threat to academic freedom.

The goal of APR to characterize as racist any denial of Palestinian narratives is particularly problematic given the contested nature of the views asserted in the APR document on political and historical issues that are the subject of legitimate debate. It is telling that APR fails to acknowledge that the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism explicitly allows for legitimate criticism of Israel and therefore does not unjustifiably restrict freedom of speech (or academic freedom) unless found to rise to the

level of hate speech. The Arab Canadian Lawyers Association egregiously misrepresents IHRA, Canada's adopted and implemented definition of antisemitism that is part of Canada's Anti-Racism Strategy 2024–2028, by stating that IHRA asserts that all criticism of Israel is antisemitic when IHRA explicitly allows for criticism of Israel.

The imposition of a contested view of the Palestinian narrative contravenes s. 2(b) of the *Charter*, which reads that "Everyone has the right to freedom of thought, belief, opinion, and expression, including freedom of the press and other media communication."[21] The purpose of this core *Charter* freedom is to reinforce the notion that democracy, one of Canada's constitutional principles, rests on the premise that public issues be freely and openly debated. It protects the individual from being forced to espouse one particular view, such as those enforced by the ACLA APR definition.

In *Irwin Toy Ltd v. Québec* (*Attorney General*),[22] the Supreme Court of Canada concluded that expression has both a content and a form, and an activity that attempts to convey meaning is expressive.[23] This led to the now known two step test in assessing whether *s.* 2(b) has been breached. The first being whether the activity in question is *expressive* in content and whether there is any basis for excluding the form of expression chosen from the sphere of protected activity. The second is whether the purpose or effect of the action is an attempt to *restrict* expression.

The ACLA APR definition is *expressive* in content since it conveys meaning through the creation of a definition of anti-Palestinian racism, and in form since it is a written definition. In terms of the second step of the *s.* 2(b) analysis, the definition forces one single narrative on a highly contested topic, that is, the historical context surrounding the Nakba. Forcing one definition on a term with conflicting narratives restricts the public's ability to openly and freely debate the issue. Not only does it limit debate, but it also, in turn, states that anyone who denies this narrow view of the Nakba is inherently racist. Therefore, this definition would pass the second branch of the test as it is an attempt to *restrict the expression* of those who disagree with the definition. The ACLA APR document states that, erasing of human dignity of Palestinians includes, "upholding a Palestine exception to fundamental rights (i.e., support free speech rights but deny Palestinians from expressing their views)." We agree that Palestinians have a right to express their views but disagree that the views of Zionists should be framed as racist and therefore at risk of being silenced.

21 *Canadian Charter of Rights and Freedoms*, s 2 (b), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

22 *Irwin Toy Ltd v. Québec* (*Attorney General*), [1989] 1 SCR 927.

23 *Ibid* at 968.

The ACLA APR definition seeks to impose a set of political beliefs about Palestinians and Palestine on all Canadians. Thus, according to the ACLA APR definition denying the Nakba is a form of racism. The assertion that one contested view of the events of 1948 must be shared by all Canadians is a conflation of anti-racism with freedom of (political) expression and is inconsistent with the definition of other forms of racism. Whereas political belief is not recognized as a protected ground in the human rights legislation of Canada, Alberta, Ontario, Nunavut, and Saskatchewan it is so recognized in British Columbia, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador, Quebec and the Yukon. The ACLA APR definition would therefore directly violate the rights of those with divergent political beliefs in those jurisdictions. Moreover, arguing that the political beliefs espoused by the ACLA APR are better understood as part of Palestinians' creed has already been examined by the courts. In *Jazairi v. Ontario* (*Human Rights Commission*),[24] the court addressed political differences regarding Israel and Palestine, ruling that political opinion, by itself, does not fall under the definition of 'creed' in section 1 of the Code.[25] The applicant's arguments that political and religious commitments were so closely linked as to constitute a 'creed' were not established. In sum, APR labelling of political beliefs that deviate from those proposed by the ACLA as racism is a clear violation of Canadian freedom of expression.

Similarly, the APR definition also labels as racism, "[f]ailing to acknowledge Palestinians as an Indigenous people with a collective identity, belonging, and rights in relation to occupied and historic Palestine." Regardless of one's views on the indigeneity of Palestinians to the region, this requirement enforces a positive obligation to adopt a viewpoint about disputed rights in relation to a contested account of "occupied and historic Palestine" while characterizing those who fail to do so as racist.[26] Treating that narrative as APR imposes an illiberal suppression of those who do not share that viewpoint. It would also unquestionably undermine academic freedom. Asserting that Israel is the ancestral indigenous land of the Jewish people, as most Jews do, or even merely discussing the Israeli narrative of the founding of Israel would leave one liable to a charge of APR. Canadians who refuse to accept "… the Palestinian right of return to their homes," a proposal that many scholars agree would result in the *de facto* end of Israel as a Jewish state, would also be considered racist (Schwartz & Wilf, 2020). Contrast this with the International Holocaust

24 *Jazairi v. Ontario* (*Human Rights Commission*), [1999] OJ No 2474 (CA).

25 *Ibid* at para 19.

26 For comparison's sake, the IHRA definition of antisemitism avoids coercive language by referring to "denying" rather than "failing to acknowledge."

Remembrance Alliance's (IHRA) working definition of antisemitism, Canada's adopted definition, which establishes a negative obligation whereby, "[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor" may, depending on the context, be construed as antisemitic. Therefore, under IHRA what is antisemitic is taking away the right of Jewish people to assert self-determination in their homeland whereas under ACLA APR any Canadian who refuses to adopt ACLA's viewpoint is engaging in APR. The former protects a minority group's right, the latter is coercive and infringes other's rights.

5.3 *C. APR Violates Academic Freedom*

Academic freedom is essential for the pursuit of knowledge and truth. It allows scholars to research, teach, and publish without undue interference or censorship. Universities protect the academic freedom of faculty members and students, ensuring they can explore diverse perspectives and ideas without fear of reprisal. Academic freedom is closely linked to but distinct from campus free expression. Unlike free expression, academic freedom is a right grounded in expertise and the distinct role of academics in a democracy. At its core, academic freedom aims to safeguard scholars in their pursuit and dissemination of knowledge, ensuring they can work without bias or obstruction. This protection implies a commitment to presenting knowledge faithfully and defending the right to critique their own institutions.

APR violates academic freedom as a *de facto* speech code that protects and privileges political opinion (e.g., by defining as racist "denying the Nakba; failing to acknowledge Palestinians as an indigenous people with a collective identity, belonging and rights in relation to occupied and historic Palestine"). The definition of APR prohibits legitimate criticism of these political opinions and thereby is a restrictor of academic freedom. Thus, APR would prevent legitimate scholarly inquiry that is protected by academic freedom (typically, a condition of employment in Canadian universities). Academic freedom usually prohibits institutions from intervening in research or teaching endeavors, or penalizing faculty for their external speech, even if it conflicts with institutional views, unless it constitutes unlawful hate speech or poisons the academic environment. APR will lead to the sanctioning of faculty who are merely employing their academic freedom to conduct research on or teach ideas that challenge the political opinions espoused by the APR framework.

The APR framework explicitly references the Boycott, Divest, and Sanction (BDS) campaign against Israel by labeling as APR those who are found, "excluding or smearing those who support or participate in Palestinian movements (i.e. BDS movement)." However, BDS contravenes the foundational

principles of academic freedom by restricting the involvement of individuals in the academic community based on their political beliefs. For instance, BDS may prevent academics from participating in conferences solely because they are Israeli citizens or express support for Israel, which, were it to occur in Canada, would be considered discrimination on the protected ground of national origin. Furthermore, what constitutes "smearing" is ambiguous with no legal precedent. Would individuals who oppose BDS be charged with "smearing" those who support BDS and thereby be accused of APR? *In toto*, APR attempts to circumvent the rights of faculty to protect the rights of those who espouse beliefs consistent with the APR definition. This is discriminatory.

5.4 *D. APR Violates Principles of Equal Opportunity and Non-Discrimination*

Universities have a responsibility to promote equal opportunity and non-discrimination in all aspects of academic and campus life. This includes admissions, hiring, promotion, and access to educational resources and facilities. Discrimination based on factors such as race, gender, religion, sexual orientation, disability, or socio-economic status should be prohibited and actively addressed. The APR framework asserts, "…, Canada's Anti-Racism Strategy must address the role that the IHRA definition of antisemitism has played in perpetuating anti-Palestinian racism." and "Research on anti-Palestinian racism shows that support for Zionism is a key driver of anti-Palestinian racism perpetrated by Zionist organizations in Canada." These statements suffer from flawed circular reasoning.

These statements codify a core component of Jewish identity for most Jews as racist. Therefore, the APR framework discriminates against Jewish people and their supporters by denying Jewish people their right to self-determination in their ancestral indigenous homeland. This is typically considered to be a form of antisemitism under Canada's consensus definition of antisemitism, the IHRA adopted by the Federal government. APR would restrict Jewish people's opportunity to freely express themselves on campuses (and more generally in Canadian society).

There is no reputable research that demonstrates that IHRA drives anti-Palestinian hate or discrimination or has any other similarly negative effect in any of the many nations that have adopted it.

5.5 *E. APR Undermines Safety and Security*

Universities have a duty to ensure the safety and security of their campus community. This includes protecting individuals from violence, harassment, and discrimination, as well as providing resources and support services for

victims of such misconduct. Policies and procedures address and prevent harassment, hate crimes, bullying, and other forms of harm. APR works to treat a core aspect of Jewish identity as a form of racism. This puts Jewish students, faculty, and staff at significant risk of discrimination simply for expressing their identities anywhere within Canadian universities and colleges. The perceived need to hide their identities to avoid marginalization, including being labelled racists, is equally problematic.

5.6 *F. APR Violates Freedom of Association and Assembly*

Students and faculty should be free to associate with one another, form clubs and organizations, and engage in peaceful assembly and collective action. Universities respect the right to freedom of association and provide opportunities for students to participate in campus governance and decision-making processes. University campuses must embrace the free expression of diverse viewpoints, including those that may be controversial to some. However, regulations governing the time, place, and manner of expression can be imposed by the University. Universities play a pivotal role as arenas where students learn to engage as responsible citizens, exploring new ideas and perspectives. It is crucial that campuses demonstrate tolerance for diverse beliefs and viewpoints within their diverse community of students, faculty, and staff, and educate students in constructive dialogue across differing opinions. Cultivating a culture of dialogue and mutual respect promotes the flourishing of free expression in a constructive and inclusive manner within this framework. By preventing the expression of political views that oppose those asserted as APR so many campus activities, including student associations, faculty research and teaching, and university collaborations, would be threatened.

6 Summary and Conclusion

The APR definition as expressed in the documents issued by the Arab Canadian Lawyers Association, Canadians for Justice and Peace in the Middle East, the Canadian Muslim Public Affairs Council, and Independent Jewish Voices, advocates for a single, highly contentious political viewpoint rather than addressing the issue of discrimination against Palestinians as it purports to do. ACLA's definition of APR defames a core aspect of Jewish identity as racist when there is no similar claim made in other definitions of racism. It also restricts legitimate scholarly activities by experts wishing to explore research on Palestinian narratives as well as the Middle East conflict. Unlike the IHRA definition of antisemitism, which was the subject of extensive international

multi-stakeholder consultations over nearly two decades, adopted by 44 countries including Canada, existing definitions of APR have been developed by highly partisan groups -- in some cases with well documented animosity to the existence of Israel. Similarly, unlike antisemitism, a construct with a millennia-old history, APR is a new construct with no evidence-base except by those promoting it. The definition has not been subjected to proper scrutiny or research and many of its claims have no supporting evidence. APR is a dangerous restrictor of free speech and academic freedom and must not be considered for adoption. APR also creates a false, invidious dichotomy such that support for Palestinian self-determination is necessarily at odds with Jewish self-determination (i.e., Zionism). It ignores the broad debate about a conflict resolution that would recognize and balance multiple national claims in this region. Such a zero-sum game is antithetical to both academic values and to Canadian values. Aside from the perils arising from the ACLA's definition of APR, APR as a construct is not justified and is legally superfluous. APR confounds the legal concept of discrimination under human rights law with racism. Existing legislation addresses anti-Muslim bigotry and anti-Arab discrimination providing Canadians with all the necessary tools to protect Palestinian people (and those of other national origins) against hate. Complaints related to discrimination on the protected grounds of place of origin should be examined and adjudicated using existing legislation without a need for an explicit definition for any specific national origin. It is untenable and unnecessary to have definitions for each of the world's close to 200 countries and countless other nationalities and existing legislation does not contemplate any one national group being given priority. Those advocating for APR are attempting through definitions and usage to demonize any expression of pro-Israel views and Jewish identity as racism, and force a single, contentious political view on Canadians.

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