

Freedom of speech; Under attack

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On a recent visit to Sri Lanka I had the opportunity to meet with the Executive Council of the Sri Lankan Bar Association, being the President Mr. Upul Jayasuriya and 10 other members (male and female) who are Presidents of their respective District Bars. The meeting was enjoyable and in many respects humbling. I was there in my capacity as President of the Northern Territory Bar Association and as a Director of the Law Council of Australia and the Australian Bar Association.

Sri Lanka is presently a hotbed of political, legal and constitutional issues. Still in recovery from the tumult of the Civil War, the present political regime headed by President Mahinda Rajapaksa is iron fisted and one which pays little regard to the Rule of Law. Notwithstanding, the Sri Lankan Bar is fiercely independent and through their very popular President Mr. Jayasuriya willing to take the fight up to President Mahinda Rajapaksa and his regime. Human rights issues generally; the Freedom of Speech and the recent illegal impeachment of Chief Justice Bandaranayake are all matters which the Sri Lankan Bar is agitating head on with this Government. Their struggle is not without danger. Three of the barristers I met had received death threats due to their involvement in human rights cases against the State. One of them had been forced to leave the country by virtue of such threats. Part of Sri Lanka's present regime involves a limited

right to the Freedom of Speech. Although there are newspaper articles which are critical of the Government's policies, like the barristers, journalists are a seriously endangered species and I learnt that over the last few years several anti-Government journalists have been attacked, shot and some have simply disappeared.

Mr Jayasuriya impressed upon me the importance of Freedom of Speech if Sri Lanka is to emerge from its present situation as a legitimate and open democracy. He also informed me that the Bar was frequently involved in actions against the State concerning this topic. I left the meeting humbled and somewhat in awe of the commitment and raw courage required and presented by these men and women of the Sri Lankan Bar.

Predictably my first reaction to learning about their situation was to reflect on how lucky we are in Australia compared to them.

Nevertheless, I quickly reminded myself that complacency and indifference are arguably the biggest problems Australia faces in 2014 vis a vis the operation and effectiveness of its democratic political system and defending the Rule of Law.

Stringent vigilance is required to prevent the State encroaching on and curtailing the basic aspects of the Rule of Law, namely Human Rights, the Separation of Powers and Freedom of Speech. The

legal profession, particularly the Independent Bar, is an important gatekeeper, tasked to prevent the Barbarians breaching the gates of open democracy and the Rule of Law.

Recently in Australia, there have been instances where Freedom of Speech has been attacked by the Federal and Northern Territory Governments.

Before we talk about these attacks it is helpful to analyse what Freedom of Speech is and why it is such an important element of any society that aspires to be free, open, just and democratic.

Put simply, Freedom of Speech is a freedom granted and enjoyed by individuals and groups allowing them to speak freely on topics without encumbrance. Like all "freedoms" it necessarily has appropriate limitations in order to prevent the speaker from insulting, vilifying and inappropriately hurting individuals, religious, racial or minority groups etc. Like all rights it has appropriate limitations. However, limitations aside, Freedom of Speech is a fundamental bedrock of any society that aspires to be truly free, open and just.

One of the earliest classical theses outlining Freedom of Speech was John Milton's *Areopagitica* published in 1644, which was the seminal treatise on the Freedom of the Press. In it he said this,

"Give me the liberty to know, to utter and to

argue freely according to conscience, above all liberties". (Writer's emphasis)

It's recognised and enshrined in the English Bill of Rights 1689. The French Revolution of 1789 specifically affirmed the Freedom of Speech as an inalienable Right in The Declaration of the Rights of Man and of the Citizen, 1789. It's covered by The First Amendment to the United States Constitution, 1791.

George Washington said this of it;

"If Freedom of Speech is taken away, then dumb and silent we may be led, like sheep to the slaughter".

It is recognised as a human right under Article 19 of the Universal Declaration of Human Rights and by Article 19 of the International Covenant on Civil and Political Rights.

George Orwell, put it, as usual, better than anyone;

"If liberty means anything at all, it means the right to tell people what they do not want to hear".

And in Australia right now it is being attacked by the current Federal Government.

Not for the first time the ABC are being attacked by the Coalition who are, of course, the current Government and are ultimately holding the purse strings.

One of the fronts of attack relates to the ABC and Fairfax Media's reportage in January 2014 concerning allegations made by Somali Asylum Seekers claiming they were assaulted by Australian Navy personnel during an interception of their boat which was trying to get to Australia.

The allegations per se are not really the point. The point is the ABC and Fairfax Media investigated a situation; discovered

individuals involved; recorded their allegations and then reported the same to the Australian community, becoming consequently the subject of a ferocious attack by the Government; the State. They reported something the State "didn't want to hear".

Now we must remind ourselves of the context of the ABC/Fairfax endeavours which occurred in a time when this Government, contra the previous Government, are implementing a "policy" which is a refusal to give out to the Australian media, thus the Australian community, virtually any information on this issue; namely the number of boats and passengers trying to get to Australia; where and when and how many have been intercepted by the Australian Authorities, etc. Namely, an official State embargo on information. Now, that in itself is more than unusual; it's alarming and in an open democracy just not on.

The State's justification for refusing to share this information with the Australian public is that the present policy being prosecuted by the State, which is entitled "Operation Sovereign Borders" is akin to Australia being on a war footing. Remember "Operation Barbarossa?" That was when Hitler invaded Russia in June 1941. We all remember Gallipoli, April 1915. Remember the Battle of Long Tan, August 1966 where Australian Soldiers fought and died in the Vietnam War? Remember the Invasion of Iraq by the Australian Defence Force in March 2003 along with the other members of the then Coalition of the Willing? That is war footing. Operation Sovereign Borders is claimed to be akin and so information regarding it has to be withheld in case it helps the enemy; namely People Smugglers.

Now of course to equate recent Asylum Seekers attempts to get to Australia on boats and claim refugee status with a "war footing"

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is arrant nonsense and an insult to the intelligence of every Australian citizen who happens to be paying for this tripe but, be that as it may, that was/is the context in which the ABC and Fairfax, doing their job of reporting news and events, discovered the incident, obtained the allegations, recorded and reported the same. Well fasten your seatbelts because here

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(PRESIDENT
THEODORE
ROOSEVELT)

comes the power of the State flexing its muscles in reaction. The ABC and Fairfax were thereupon, and are still being, attacked by the State for quoting “mere allegations”, i.e. unsubstantiated or uncorroborated without any other evidence. It shouldn’t be done. It’s irresponsible. The ABC needs to be investigated.

The alarming attack was best put by the Minister of Defence, Senator David Johnson, who was apparently “seething with anger” according to reporter Greg Sheridan in the same edition of the *Weekend Australian* of 8 February 2014. The said Senator Johnson dismissed a Fairfax report in which a Somali man, Yousif Ibrahim Fasher, said he was a witness to brutality where asylum seekers allegedly had their hands burned.

“He’s not even Australian”, Senator Johnson said. “I mean, it’s all very well but these people are desperate people, we are winning this battle, and I expect there will be more aspersions cast as they lose money, lose face and lose

opportunity”.

Now when I read that quote, amidst a sea of similar bile from the PM and other Weekend Australian commentators, I recognised it was nothing less than a bullying attack on the Freedom of Speech. What a disgraceful thing for a Federal Minister of the Crown to say. The Barbarians are well and truly in the Gate and doing what Barbarians do. The inappropriateness of that statement by Senator Johnson is best put by one of the great lions of the American Republican Party and 26th President of the USA, Theodore Roosevelt, who said, when he was actually President of the USA;

“To announce that there must be no criticism of the President, or that we are to stand by the President, right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American Public”.

Now of course we all know that no self-respecting politician on any side of Australian politics would advocate against the Freedom of Speech; “oh dear no; perish the thought”. After all, the present Federal Government swears by it, hence it’s repealing of Sections 18C and D of the *Racial Discrimination Act*. However, and this is the point; the State likes to intimidate it with a view to curtailing it. And the essence of Freedom of Speech is you either have it or you don’t. There is no “Clayton’s version”; you don’t have a real open free democratic society with a curtailed Freedom of Speech. Sadly many countries do e.g. Russia, Myanmar, and Sri Lanka. They are not real open democracies. The situation with this story concerning allegations made by “non-Australians” is still ongoing with recent further reports made by both the ABC and Fairfax of further witnesses to the allegations which the Australian Government refused to even investigate. How that actual story pans out will be

interesting, but again I stress the point; the substance of that story is secondary to the real point which is State bullying displayed towards our media, thus an attack on Freedom of Speech.

A similar thing has recently occurred here in the Northern Territory. It involved the Northern Territory Attorney-General and First Law Officer, Mr John Elfrink MLA’s recent reaction and conduct concerning an article written by Russell Goldflam, President of the Criminal Lawyers Association of the Northern Territory (CLANT) published in the January 2014 edition of *Balance* which contained criticism of Mr Elferink regarding his reaction to a recent Northern Territory Supreme Court decision.

Mr. Goldflam’s article was critical of the Northern Territory Attorney-General’s statement following the Government’s unsuccessful Supreme Court Application for indefinite preventive detention, pursuant to the new *Sex Offenders Act 2013*. The Learned Attorney-General had reacted to that judgement by saying publically “we will look at amending the legislation if the Court’s decisions are not consistent with Government expectations”.

As always with Russell’s articles, it was intelligent, well written and relevant, illustrating the fragility of the Separation of Powers within our constitutional framework. It drew upon history, namely the virtually democratically elected Hitler’s Third Reich to demonstrate how that separation can be smudged and what can flow therefrom. The Article in *Balance* was superimposed over a fantastic photograph displaying courage and dissent taken at the Hamburg Shipyards in 1936 which showed a crowd of German workers celebrating the launch of a German naval craft in a united display of Sieg Heil! salutes. United bar one, namely Mr August Landmesser, who is seen standing amidst the lemmings looking singularly



unimpressed with his arms firmly crossed over his chest. Mr. Goldflam also stated in said article;

“I am [not] worried that we are sliding towards fascism. I have no doubt that John Elferink is sincerely committed to securing the peace, order and good government of the Northern Territory, and moreover, I accept that his concerns [regarding, the administration of the *Serious Sex Offenders Act 2013*] are both clear and proper: the protection of the community and the protection of the public purse”.

Following the publication the Northern Territory Attorney General, the First Law Officer of the Northern Territory reacted in a manner that was totally inappropriate.

The A-G, complete with the infinite resources of the Department of Justice, not to mention his Second Law Officer, the Learned Solicitor-General, could have disagreed with the article by countering it with his own article in *Balance* or indeed, in the media generally if he saw fit. It could have, should have, been a subject for debate. He could have addressed the criticism by

arguing against it explaining how it was misconceived, ill-founded, wrong, and unfair and why. None of that. What the Attorney-General did was to pick up the phone and ring Mr. Goldflam directly and demand from him an apology for his published article. No debate. Just a demand.

Apparently the historical references on the superimposed photograph were what caused him umbrage.

“He is not even Australian”. Phoning and demanding an apology for an article which is relevant and critical to Government policy. These are examples of the Executive inappropriately flexing their muscles to counter criticism of their policies through the essential component of open democracy, Freedom of Speech.

Within a few days of the phone call demanding an apology it was given and placed on the CLANT website. It was also published in the last edition of *Balance*.

The story doesn't end there however. The number of people who read the CLANT website and *Balance* combined is probably on a par with the average attendance of Brechin City Football Club; namely four men and a dog. Notwithstanding, the apology within days, found itself the subject

of a story in the Northern Territory News at page 5, 30 January 2014 written up by Northern Territory News journalist Ben Smee. The story explained Mr Goldflam's article and his resultant apology and quoted from it. It ended with a quote from the Learned First Law Officer who obviously spoke to Mr. Smee about it by saying he had accepted Mr. Goldflam's apology and was “grateful to him for his courage in being so forthright in apologising”.

The above tawdry tale is one that should cause the public concern and alarm by virtue of the conduct of the Northern Territory Attorney-General. By not being able to take legitimate criticism, demanding an apology and receiving the same which then, somehow or other, happens to find its way into the NT News complete with the Attorney-General's gratitude augurs poorly for the Freedom of Speech and reminds us that for it to be maintained it needs to be vigorously defended. Mr. Elferink's quote concerning “courage” is completely inappropriate. The only courage evident in the story was that of Mr. Landmesser. It was the same courage I saw and heard from the members of the Sri Lankan Bar Association. ●

Quote from Shawshank Redemption

- **Rehabilitation Officer:** Ellis Boyd Redding: your file says you've served 40 years of a life sentence. Do you feel you've been rehabilitated?
- **Red:** Rehabilitated?... Well, now, let me see. You know, I don't have any idea what that means.
- **Rehabilitation Officer:** Well, it means that you're ready to rejoin society, to—
- **Red:** [Interrupting] I know what you think it means, sonny. To me it's just a made-up word. A politician's word, so that young fellas like yourself can wear a suit and a tie and have a job. What do you really wanna know? Am I sorry for what I did?
- **Rehabilitation Officer:** Well, are you?
- **Red:** There's not a day goes by that I don't feel regret. Not because I'm in here, or because you think I should. I look back on the way I was then: a young, stupid kid who committed that terrible crime. I want to talk to him. I want to try to talk some sense to him, tell him the way things are. But I can't. That kid's long gone and this old man is all that's left. I gotta live with that. Rehabilitated? It's just a bull#### word. So go ahead and stamp your forms, sonny, and stop wasting my time. Because to tell you the truth, I don't give a ####.

