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Blasphemy and Racial Vilification

Robert Orr and Margaret Donaldson examine the 'The Satanic Verses' case in the context of Australian and NSW law

The attempted prosecution for blasphemy of Salman Rushdie and Viking Penguin, the author and publisher of *The Satanic Verses*, was the subject of the interesting English decision last year of *Reg* v. *Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* (1990). The decision that the prosecution could not proceed was hailed by some as a victory for free speech over religious fundamentalism, though criticised by others for failing to protect the rights of a minority group.

The most important issue was whether the law of blasphemy in England and Wales protected only the Christian religion or extended to protect other religions, in this case Islam.

The court considered the long history of blasphemy in the criminal law and concluded:

- While the offence developed in ecclesiastical law it was seen as a civil offence primarily because Christianity was the established religion. It was therefore related, in a sense, to sedition as an offence against law, the state and the government.
- By the nineteenth century sober and reasoned attacks on Christianity were not considered blasphemous; the attack had to be a scurrilous vilification of that religion.
- By combination of the above, the basis of the offence was a tendency to shake the fabric of society generally, both because of the attack on the established religion, which had the support of the law, and also because the attack may lead to a breach of the peace.
- There is an element of strict liability about the offence, in that mere intention to publish is sufficient to constitute the crime and intention to offend is not required.

The court noted the law of blasphemy protected only the Christian religion, but observed:

"... the anomaly arises from what Lord Scarman called 'the chains of history', the origins of the law in the Ecclesiastical Courts, and the fact that the Anglican religion is the established law of the country".

The court therefore held that the law of blasphemy only protected the established Christian religion and felt bound to follow that law, believing it was the function of Parliament alone to change it, particularly in criminal cases.

Interestingly, Lord Justice Watkins also considered the broader policy issue by suggesting that notwithstanding the anomaly, were it open to the court to extend the law to protect religions other than Christianity, it would refrain from doing so for a number of reasons, including the problems arising from determining which kinds of religion are to be protected and how religion is to be defined.

The decision has particular relevance for Australia. Section 116 of the Commonwealth Constitution provides that the Commonwealth shall not make any law for establishing any religion. It is arguable that the law of blasphemy contained for example in section 118 of the *Broadcasting Act* and regulation 13 of the Customs (Cinematograph Films) Regulations infringes that constitutional restriction. Even if section 116 of the Constitution does not have this effect and, with regard to laws whose source is not the Commonwealth (in particular the common law crime) it is difficult to see how there can be such an offence in the absence of the establishment of any religion in Australia. It is clear that there is no such established religion under any law in Australia.

The law of blasphemy is undoubtedly inappropriate in Australian society. Various legislatures and bodies have indicated that the concept of racial vilification is now more appropriate. The Australian Broadcasting Tribunal's Television Program Standard 2(b) provides that a licensee may not transmit a program which is likely to incite or perpetuate hatred against or gratuitously vilifies any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, religion or physical or mental disability. Radio Programme Standard 3 is in similar terms.

In NSW the *Anti-Discrimination Act* now includes as yet untested racial vilification provisions. However, it is not clear whether the Act would achieve, in facts similar to those in *Choudhury*, a balance between the interests of groups practising 'non established religions' and the interests of writers and publishers wishing to express ideas that challenge those groups and their practices.

The difference between the offence of blasphemy as outlined in *Choudhury* and an an offence under the *Racial Vilification Amendment* is that the former is based on the false assumption that we live in an homogeneous society with homogeneous religious beliefs. The *Racial Vilification Amendment* however assumes a heterogeneous society and gives a right of action to any person or group vilified on the ground of their race, whatever that may be. It has the potential to protect

In this Issue —

powerless minority groups.

Another major difference between the offence of blasphemy and the Racial Vilification Amendment is that the former focuses on religion and the latter on race. Section 4(3) of the Act defines race as including colour, nationality and ethnic or national origin. Further it allows a race to be comprised of two or more distinct races. But does the vilification of a religion constitute the vilification of a race giving the people who subscribe to that religion a right of action?

Obviously the question of racial identity is a complex issue but if reliance is placed on decisions in similar cases in other jurisdictions a broad and flexible test should be adopted in NSW. In New Zealand for instance discrimination of Jewish people was sufficient to amount to racial discrimination (*Kina-Ansell* v *Police* (1979)). The House of Lords has found Sikhs to be an ethnic group. Following these decisions the vilification of Islam would constitute the vilification of an ethnic group or groups.

The *Racial Vilification Amendment* provides protection well beyond that which the court in *Choudhury* was prepared to give. However the Act does balance this protection by section 20C(2) which excludes from the operation of the Act:

"a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter."

No doubt arguments very similar to those put by Rushdie and the publisher in *Choudhury* would be put by a defendant if action was taken under the *Racial Vilification Amendment*, that is questions of artistic license and the distinction of narrative voice and the author's position, as well as questions of reasonableness.

An express exemption for works done for an artistic purpose gives greater protection to publications like *The Satanic Verses* than offered in blasphemy. Like the offence of blasphemy the *Racial Vilification Amendment* protects a reasonable treatise of racial issues as opposed to scurrilous vilifications. Unlike the law of blasphemy, which maintains a false depiction of society in order to limit its application, the *Racial Vilification Amendment* expressly exempts particular types of discourse so that the concerns for freedom of speech are addressed in a more appropriate manner.

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CONTENTS