Communications LAW

B•U•L•L•E•T•I•N

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION INCORPORATED

Print Post Approved PP: 234093/00011 EDITED BY NIRANJAN ARASARATNAM AND SHANE BARBER Vol 22 No 4 2003

To What Extent Does Racial Vilification Legislation Limit Free Speech Within the Australian Media?

Fidelma Maher, in this CAMLA Essay Prize winning paper, argues for greater sophistication in the media's ability to report and analyse divergent racial views as a potential counter to the need for racial vilification legislation

Anti-vilification legislation aims to protect particular groups against the damage caused by vilifying speech. Proponents of the legislation highlight the importance of limiting the harm of racism, by restricting racially vilifying speech. Some opponents of the legislation, particularly within the theoretical history of American social libertarianism, argue that a vigorous free market of ideas is the best way of encouraging open and informed debate, where racist ideas can be analysed and argued against. For the media, with its fundamental role in reporting news and information, vilification legislation means that journalists are restricted in merely reporting racially vilifying material, and must balance it within the wider context of historical and societal racial oppression. This applies pressures on journalists, within the already existing constraints of their roles, to act as de-facto educators. It is essential that freedom of the press is not limited so as to nullify any racial discussions. Racial vilification legislation has a vital role in providing recourse when all other avenues have been lost, or when the vilification is such that it is best decided in the legal arena. This reliance on the legislation, however, can be limiting, as the debate is constrained within legal boundaries. Open discussion within the media provides a greater forum for diverse viewpoints, and allows a dissemination of ideas that is impossible within the law. Ultimately, the media have a responsibility to report news, even if this news is potentially hurtful to members of our society. This is illustrated with the example of Pauline Hanson and One Nation, and the legislative and media response to their perceived racism.

THE EFFECT OF LEGISLATION

Racial vilification legislation is supported by international treaties and local and national legislatures worldwide. Support and opposition to legislative restrictions on free speech come from a variety of perspectives. Matsuda asserts that individuals who identify with groups that have been traditionally vilified are more likely to be aware of incidents of racial vilification, and connect them to a wider system of racism. These groups,

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then, are more likely to be supportive of racial vilification legislation than individuals who have not been subject to racism:

> *"The typical reaction of target-group members to an incident of racist propaganda is alarm and immediate calls for redress. The typical reaction of non-target-group members is to consider the incidents isolated pranks, the product of sick-but-harmless minds. This is in part a defensive reaction: a refusal to believe that real people, people just like us, are racists. This disassociation leads logically to the claim that there is no institutional or state responsibility to respond to the incident. It is not the kind of real and pervasive threat that requires the state's power to quell." (Matsuda 1989: 2327)*

This quote highlights the difference between Australian and American approaches to free speech. Matsuda calls for the introduction of an anti-racial vilification legislation that is specifically designed to target the historical and social oppression of racial groups within the United States. The prevailing belief in social libertarianism in the United States means that the consideration of free speech is paramount, resulting in the situation whereby the First Amendment protects the rights of the Ku Klux Klan and other racist groups and affords them police protection to march and assemble in public areas. Even the American Civil Liberties Union has fought court battles to ensure the rights of Nazi Party groups to hold rallies (Downs 1986: 233). Australians are much less protective of any perceived right to free speech, and are more willing to accept legislative controls.

Continuing the argument in favour of American laws to prohibit hate speech, Mahoney highlights another way in which American constitutional approach to governance has prevented the introduction of racial vilification legislation;

> *"The limits of rights only can be properly understood through a contextual, purposive, harms-based approach which respects equality. This approach not only exposes previously hidden issues but also affects how the issues are framed and how legal principles are applied. It challenges the assumption that human behaviour can be generalized into natural, universal laws. It challenges civil libertarian orthodoxy, centred on the individual's relationship to the state, by emphasizing the importance of the relationship of individuals to one another." (Mahoney 1996: 807)*

Both in theory and in practice, Australian racial vilification laws strive to create a balance between the rights of the individual or the media to free speech, and the very real harm that can be done through racial vilification.

THE MEDIA, RACIAL VILIFICATION AND WAR

In an environment where supporters of free speech often place the ideological ideal of a "free" press above all other considerations, it is dangerous to underestimate the power of the media to inform and shape popular opinion. The recent history of warfare is littered with accounts of media being used as propaganda machines. Aside from the more complex questions of media independence in conflicts such as the recent Iraqi war, governments have been directly involved in media manipulation during conflicts, from pamphlet drops, to Radio Free Europe, to manipulation of new media

technology in Bosnia. One example of this was the conflict in Rwanda, which saw a highly organised systematic use of radio manipulation to spread disinformation and coordinate violence:

> *"Nowhere in the post-Cold War world was the radio used as insidiously as in Rwanda. There, the now deposed Hutu government utilized official and unofficial radio sources to incite and carry out the 1994 genocide, in which an estimated eight hundred thousand people, mostly Tutsi, were killed." (Metzl 1997: 629)*

Metzl says that international law restricting the use of radio jamming technology, and the American disinclination to support radio jamming as limiting to free speech, contributed to the failure to prevent radio propaganda assisting the genocide in Rwanda.

It is obvious that local racial vilification legislation is virtually useless in an undemocratic, war-torn society. What is arguable, however, is that if local or international law can be used to protect racial groups against the extremes of media-based racial vilification, that is, explicit and protracted incitement within the media, then considerations of free speech must come behind the protection of people.

While this is an extreme example of racial vilification within the media, and it is certain that a free and vigorous press will not necessarily participate in racial vilification propaganda, it is obvious that ignorance, convenience and prejudice can combine to create racially vilifying material in the media as much as direct influence. The question is, at what point does *"an odd mixture of interesting analysis punctuated by sensationalized negative stereotype"* (Alexander 2002: 110) stop being racially insensitive, and start being racially vilifying? The answer to that question can often depend on which racial group you belong to, demonstrating just how subjective racial vilification legislation must be.

RACIAL VILIFICATION AND DOMINANT CULTURES

Racial Vilification legislation is often seen to be less forceful towards occurrences of racial vilification of "dominant" (predominantly white) groups by traditionally oppressed racial groups. The race of the person making vilifying speech is as much a consideration as the race of the material's target when determining the existence of racial vilification. Racial vilification is most effective when directed at historically oppressed groups. Matsuda illustrates this with the case of Malcolm X making speeches that include the term "white devils". While any attack on the basis of race is damaging, attacks by the racially oppressed on groups that are not tied to social/historical racial oppression are less harmful because they are not tied into an overall system of racism:

> *"Because the attack is not tied to the perpetuation of racist vertical relationships, it is not the paradigm worst example of hate propaganda. The dominant-group member hurt by conflict with the angry nationalist is more likely to have access to a safe harbour of exclusive dominant-group interactions. Retreat and reaffirmation of personhood are more easily attained for historically non-subjugated-group members." (Matsuda 1989: 2361)*

Within the context of the media, is the white reader offended by an anti-Western speech by a member of a nationalistic group better equipped to find reaffirmations of personhood in the mainstream press than the Asian or Middle-Eastern reader is when confronted by news stories, editorials and opinion columns that demonstrate, if not racism, then at least a level of cultural ignorance that they feel alienated by? The function and popularity of ethnic newspapers must in some part be tied to the lack of representation of that ethnicity in the mainstream media. As it is apparent that racial vilification does not exist within a cultural vacuum, it is arguable that the media thus has a responsibility to foster an environment where the market place of ideas is a viable illustration of the nature of racial debate.

RACIAL VILIFICATION AND ONE NATION

Regardless of their accuracy or moral value, Pauline Hanson's One Nation policies tapped a core of dissatisfaction in the community. The response by elements of the media and cultural "elites" were not effective to completely counter the policies of One Nation. This should be seen as a failure of the media. If journalists are convinced of the inaccuracy of a person's opinion, they should be able to present enough proof to the contrary to demonstrate the truth as they see it. The failure of cultural commentators, editorialists and celebrity opinion to convince large swathes of the community that Pauline Hanson and her policies were racist, inaccurate and dangerous is partially a result of an inability to understand the audience they needed to address, as opposed to the audience they actually had. Advertising departments of newspapers, magazines and television and radio stations carefully calculate their audience demographics. If, for example, the Sydney Morning Herald or ABC Radio present powerful, cogent arguments detailing the problems with Pauline Hanson and One Nation policies, but only a small degree of their audience are even inclined towards Hansonism, how does this benefit the dissemination of a broad range of information within the social market place? In other words, preaching to the converted may be comforting, but it does not substantially contribute to the marketplace of ideas if the audience for those ideas is narrow, and the same ideas are being disseminated.

It can be argued that some of the seductiveness of Pauline Hanson and

One Nation was the way in which issues that had been circumscribed were given attention in the media. Regardless of the validity or fairness of the beliefs of One Nation and its supporters, it is obvious that the debate revealed genuine concerns of both supporters and opponents of One Nation that had not been substantially expressed. The massive media coverage surrounding the rise and fall of Pauline Hanson made room not only for the extreme beliefs on both ends of the ideological divide, but also for reasoned, educated arguments concerning not only the substance of One Nations agenda but also the nature of the debate itself.

Lawrence McNamara's essay, *"The Things You Need: Racial Hatred, Pauline Hanson and the Limits of Law"*, discusses the law's failure to proscribe all forms of hate speech, in the context of the unsuccessful racial vilification action against Pauline Hanson.

> *"The law accepts Pauline Hanson in her own words, on her own terms, and in doing so grants a legitimacy to the political discourse in which she engages. It protects her on the basis of grammar and syntax, and leaves the parties to fight the battle for meaning in the domains of politics and culture." (McNamara 1998: 121)*

McNamara argues that the failure of law to recognise the racist foundation of Pauline Hanson's policies indicates that *"there is more to Ms Hanson's statement than the purely legal and literal interpretation uncovers"* (McNamara 1998: 122). This assertion suggests that to rely on legal methods as a way of dealing with racial vilification is to restrict the discussion to its legal boundaries. Language, by its very nature, is more flexible and fluid than the law is able to regulate. The intertextual relationships of language, as espoused by post-structuralist theorists such as Julie Kristeva, suggest that all writing and speech is influenced by the texts that come before them (Kristeva 1980: 69). Regardless of whether Pauline Hanson is consciously a racist, the language she uses does not exist in a vacuum, but is influenced by the language of those who have come before her, both those who share similar ideas and those who have fought them. Stanley Fish describes this discourse as speaking in code, where, "the speaker does not deceive the audience but tells it what it wants to hear, and, moreover, tells it in terms that allow its members to give full rein to their prejudices and yet appear to repudiate them (Fish 1994: 90).

LANGUAGE AND THE MEDIA

What affect does this have on the media? While there may be little legal recourse to someone merely because the language they use *infers* racist ideas, and has racism as its grounding principle, this does not mean that their language should be repeated without question in the media. When language is taken on its surface value, when it is reduced to its legal parameters, then meanings intrude without the control or conscious will of the journalist. The power of certain historically racist words, such as nigger, kike, or slope, is now accepted to the point where these words are not used in the media, or if referenced are often reduced to the truncated level of profanity. If the media can accept the insulting power of single words, then it should also be able to put racial discussion within its wider social and historical framework. Failure to contextualise racial discussion can inadvertently perpetuate the very racism that such discussions purport to dispel. Meadows describes this failure as a second form of racism, and says that it:

> *"Is more widespread and more insidious because it is largely invisible. This is the kind of racism that puts forward naturalised versions of events relating to race that inscribe into them certain propositions as a set of unquestioned assumptions. It enables racist statements to be made, divorced from the racist basis on which such statements depend." (Meadows 2001:165-6)*

Only by questioning assumptions and statements made by both themselves and sources are journalists able to morally and usefully navigate the racial discussions that lie outside the protection of the law.

This issue is made more problematic when groups wage moral battles through the legal system. This is illustrated as McNamara asserts:

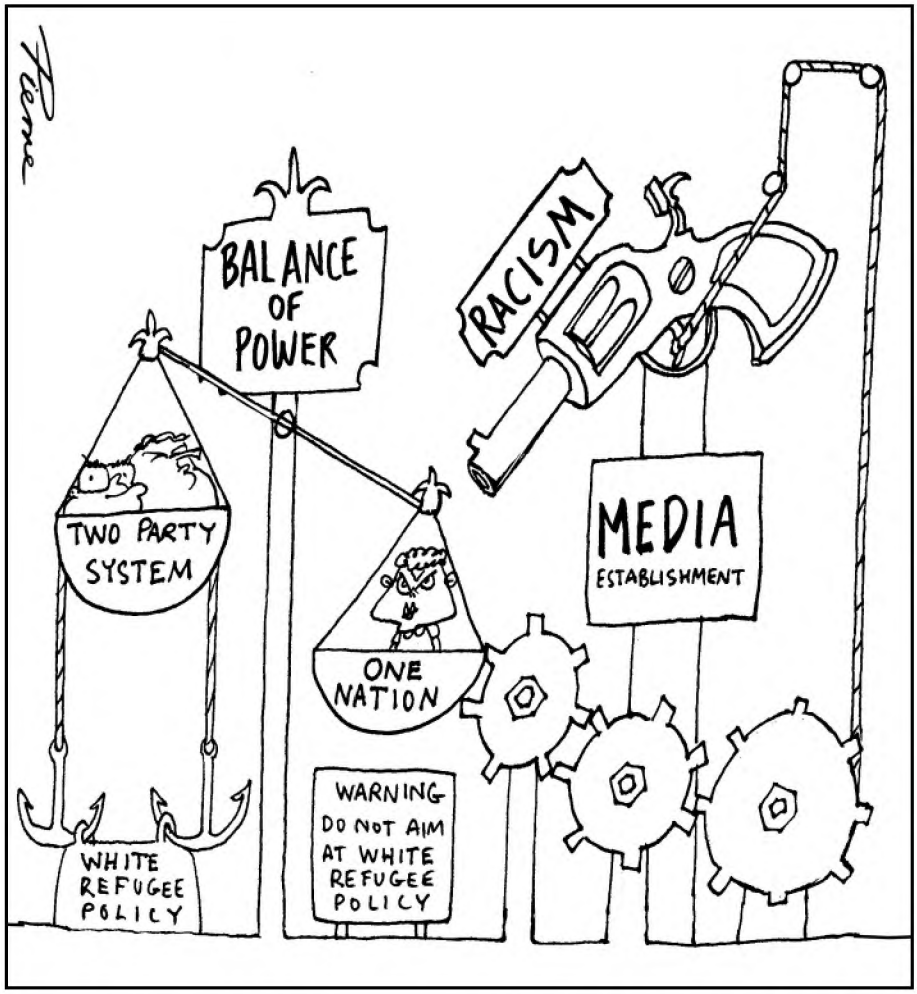
> *"To legally validate the statements of Pauline Hanson should not be to suggest they deserve respect; simply because the law says something is acceptable does not necessarily imbue it with civil or moral worth" (McNamara 1998: 122).*

If society solely relies on legal methods as a response to conduct that "ought not to be tolerated", then the success or failure can only be viewed within legal principles. Lively debate throughout the media should exist alongside any legal course. There is often a risk of so-called "trial by media" cases, but notwithstanding the restrictions of sub-judice contempt, the media has a role in educating the public about all facts in a debate, as well as reporting and analysis of different parties points of view.

Pauline Hanson's political threat to society, as implied by McNamara's article, are somewhat alleviated by the political decline of Pauline Hanson and One Nation. The dramatic decline in Pauline Hanson and One Nation's electoral vote in the March 2003 New South Wales State Election points to a success for the argument that open and vigorous debate can educate and change audience's opinions on certain topics. Critics may say that one reason for the decline in One Nation's political fortunes is due to the co-option of their policies by the mainstream political parties, but it could also be argued that

policy is not the sole reason when supporting a particular candidate. Rather, much of the media debate and publicity would have revealed flaws in One Nation's overall image, be they of policy, personal integrity, organisational abilities, or a failure to implement the policies they had espoused, leading to desertion by their constituency. Thus we can see the example of Pauline Hanson and One Nation as an instance where related legislation was unable to be implemented against alleged racial vilification, but where time and exposure in the media has led to the decline of the party's political fortunes.

The existence of racially vilifying beliefs in our society is without question. The use of legal methods to prevent publication of these ideas must be tempered by the importance of freedom of speech and the cost of prohibition of these ideas. Many personal vilification cases (that is, cases that are brought by individuals against other individuals) amply illustrate that vilification law can often be the final recourse against aggressive and protracted vilification. Legislation is, by necessity, a blunt object – laws must be broad and objective to comprise the full range of legal possibilities. The nuances of language and society can sometimes be lost within the boundaries of legal construction. Ideally, racial vilification legislation should not be necessary in relation to the media. The diversity of our media outlets should allow for conciliation to occur in the form of right of reply, an ideological variety of commentators, and, above all, a drive for true diversity of views in the media, so that no one opinion is given primacy. In the absence of this idealised media, however, it is clear that racial vilification legislation remains an effective, if unwieldy, tool for the oppressed.



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