The Case Against Racial Defamation Laws

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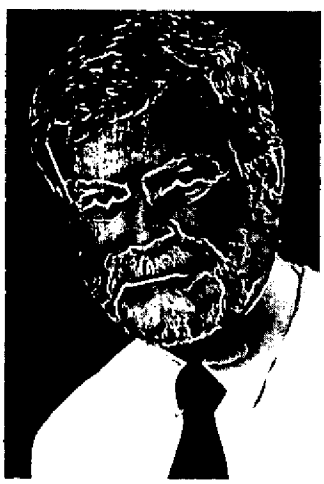

Any proposed restriction on freedom of speech is a cause for concern, particularly in a society like ours where there are already many such restrictions imposed by the laws of libel, blasphemy, contempt, sedition and obscenity. In the absence of any constitutional guarantee of freedom of speech there is little or no defence against the misuse of laws written with the best intention.

It is taken for granted that in times of crisis a state may act to limit freedom of speech to protect its security or its calm and good order. So, it may be argued, any speech which inflames hatred between sub-groups in the community and thereby threatens the peace of the community may be prohibited. But only if the first condition is met – that there is a crisis in existence. It would need to be demonstrated in an empirical way that the Australian community is indeed in such a critical state, with its calm and good order in peril, before the draconian restrictions applying in New South Wales, for instance, could be tolerated. I see no evidence that inter-group hatred is so intense or our social fabric so fragile that such measures should be tolerated.

Indeed, it is doubtful if – in the cases where animosities may spill over into violence – the State would prohibit inflammatory statements. The application of any anti-vilification law would almost certainly be selective and would benefit some groups at the expense of others. For instance, in the case of relations between Serbs and Croats, or between Irish of Protestant and of Catholic persuasion, or between Macedonians and Greeks, I do not believe that the publication of statements would be prohibited; nor would even the most extreme vilification of Anglo-Celtic persons by Aboriginal persons.

It may be desirable for a law to be written which gives

New South Wales and Western Australia both have legislation against racial vilification. Since 1989, it has been unlawful in New South Wales to incite hatred (including serious contempt or ridicule) against a person or group on the grounds of that person's or group's race. The Western Australian legislation (1990) prohibits the publication or display (or possession with the intention of publication) of threatening or abusive material with the intention of inciting racial hatred. The Victorian Government is now considering introducing legislation along similar lines.

A Committee to advise the Victorian Attorney-General on the question recommended in a Report published in March that Parliament should legislate that "it is a criminal offence to speak or behave towards another person in a manner that threatens or abuses that person on the ground of his or her race or religion." The Committee also recommends outlawing the display (or possession with the intention of display) of printed matter that is intended to intimidate on the grounds of race or religion. The Committee proposes that the legislation cover private as well as public communication.

Terry Lane, who hosts a regular discussion program on ABC Radio in Melbourne, made a submission to the Committee of which this is a slightly shortened version.

aggrieved persons or groups some redress without resort to prohibition or censorship. I suggest three such remedies for consideration:

- **Compulsory conciliation:** In this process the aggrieved person and the person giving offence should be brought together to find some common ground. This may lead to the retraction or modification of the offending statement. This is unlikely, of course. The more probable outcome would be mutual obduracy.
- **Compulsory argument:** In this case the contending parties would be compelled to argue out their case in public. The citizenry would be invited to attend such arguments and a permanent record would be kept of them for reference by any other person subsequently canvassing the same opinions. For instance, the argument may be about the truth of the accepted version of the Holocaust, as in the case at present before the Anti-Discrimination Board in NSW. It is pointless and philosophically repulsive in a democracy simply to prohibit the publication of one point of view, no matter how outrageous or offensive. Let the record contain the argument and its refutation. In this way a body of material of immense value to the community would be generated. One hopes that in such a process the truth will prevail over falsehood. Democracy is built on that confidence.
- **Compulsory co-publication:** Take the current New South Wales case again. It would not be unreasonable to impose on the publisher of certain types of material which may be deemed to excite prejudice the obligation to attach to his publication an answering document, the costs to be born by both parties. This would cut both ways. There is at present in circulation a document called *The Christian Press in Contemporary Australia*, by W. D. Rubenstein and M. Cohen, and published by the Australian Institute of Jewish Affairs. In this publication, the journal of the Australian Council of Churches, *In Unity*, is described as "Obsessively anti-Israel – had crossed border to anti-Semitism. One of major sources of anti-Jewish hostility in Australia." There is no doubt that this publication would excite Jewish antipathy to individual Christians and to churches and church councils. A complaint of racial vilification would never be sustained before any tribunal, but there is no reason why offended Christians should not seek the right of co-publication, within the same covers, to reply to their detractors. Indeed, there is a good argument that this right of prominent reply should be the customary rule governing libel cases, rather than the immediate resort to punitive litigation.

I am deeply prejudiced in favour of the absolutist position on freedom of speech. I accept the limitation that says I may not shout "Fire!" in a crowded theatre. I do not believe that contemporary Australia fits the analogy of the crowded theatre. The evidence is that we are a tolerant community in which racial hatred, while no doubt existing, is exceptional rather than normal.

Suppression of public debate

To extend the concept of libel to cover groups will have a chilling effect on public discussion. There is already a widespread unwillingness amongst writers and broadcasters to broach the subject of the Middle East. I have publicly declared that I will never again discuss anything to do with Israel or Palestine on my program because the resulting harassment and intimidation are unbearable. To add to the informal censorship which already applies to discussion of certain issues the threat of formal litigation would see whole areas of enquiry closed off.

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Professor Geoffrey Blainey was accused by his colleagues at Melbourne University of inflaming racial hatred. If that were proven to be true, then under the NSW Act he could be fined up to $40,000 or sentenced to a term in prison. It is nonsense, of course, but it is an indication of the dangerous territory into which anti-vilification legislation will take us. At the very least Professor Blainey could be put to the expense, anxiety and inconvenience of having to defend himself before a tribunal. That is an intolerable restriction on freedom of speech. On the other hand, it would not be an unreasonable imposition to compel him to face his detractors and to deal with their arguments.

Geoffrey Blainey

In the 1970s Professor Hans Eysenck was prevented from putting his controversial views on race and IQ in Melbourne by a censorious audience. It would be a terrible travesty to accord to the howling mob the protection of law. Eysenck's case either will or will not stand up to scrutiny and argument. What he says about race and IQ cannot be settled by simply prohibiting the publication of his point of view. Indeed, it will most likely have the contrary effect of making people think that there may be some truth in his thesis.

Who should judge?

It is difficult to see how a truly disinterested adjudicator could be found to pass judgment in these cases. If the adjudicator is from a minority group, sensitive about its security in the community, then that person has a vested interest in interpreting the law in the most severe and literal

way. On the other hand if the adjudicator is appointed from the dominant Anglo-Celtic community then this person is as likely to be indifferent as to be disinterested.

Permit me an analogy. Take the case of a baby born deformed. Who should decide if the baby should live or be let to die? It could be argued with equal vigour that the parents should or should not make the decision. If the baby lives the parents will have their whole lives distorted. Therefore, it could be argued, the decision should be theirs alone, because they are the ones affected. On the other, it could be said that this is precisely the reason why they should not have the prerogative to choose between life and death for their infant.

So, in the case of a calumny perpetrated by an Anglo-Celt against an Aborigine, who should judge? A person from the affected group who after all must live with the effect of the calumny? Or one from the offending group who may be so detached and objective as to be unable to empathize with the plaintiff? Where on earth will we find the truly disinterested judge?

Existing Laws

One more thing must be kept in mind: there are already laws prohibiting incitement to commit a crime. If there is a serious case to be made that a publication will in all likelihood lead to the commission of a crime, then it can be dealt with under existing laws. Similarly there are laws against the destruction of property and trespass which can be invoked against racist vandals who commit acts of desecration. There is certainly no reason to believe that if the present laws have failed to curb secret acts of vandalism, any new laws will be more successful. Disturbed people will paint swastikas on synagogue walls or anti-Asian slogans on station platforms regardless of the laws in force.

It is impossible to see how racial harmony would be encouraged, improved or guaranteed by the imposition of penalties on those who express outrageous views. These desirable traits of the good society come from within. They cannot be legislated into existence. Racism is in the mind. I have no doubt that preventing people from speaking what is in their minds will produce festering resentment and violence. Minority groups will be less rather than more secure in such circumstances.

In conclusion, I do not believe that there are any tensions, threats or menaces which exist in the Victorian community at the moment which would justify the suspension of a fundamental liberty which underpins every liberal democracy – the right of every citizen to speak what is on his or her mind, no matter how offensive or even untrue it may be. The principle of freedom of speech is indivisible and absolute. As soon as it is qualified with the words: "As long as it is true and it does not give offense" then the principle is destroyed. ■