The construction of ‘Indigenous identity’: Racism, the media and the Bolt case

Alperhan Babacan
Swinburne University of Technology, Melbourne

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Associate Prof Alperhan Babacan is Deputy Head of School, School of Accounting, Economics, Finance and Law, at Swinburne University of Technology, Melbourne. His research interests include refugee and immigration issue, human right law, community development, multiculturalism, globalisation and citizenship theory. Alperhan holds a PhD and Honours degrees in law and arts. Alperhan has twenty years of extensive work and research experience in the government, community and private sectors where he has worked as a researcher or solicitor. Alperhan has published widely in scholarly journals and books.

The media “are not only a powerful source of ideas about race, but they are also one place where these ideas are articulated, worked on, transformed and elaborated” (Hall, 1981: 37). The media are so influential that they construct for us, positions of knowledge and identification which allow us to identify with ‘ideological truths’ as though such ‘truths’ originated from ourselves (Hall, 1981: 30, 31).

Using the case of Eatock v Bolt [2011] FCA 1103 (28 September 2011) as a backdrop, this paper analyses the impact of the media on the construction of racism and attempts to define Indigenous identity in Australia. The paper commences with a presentation of the facts and decision of the case. The Federal Court of Australia determined that the comments made by Andrew Bolt in reference to ‘fair skinned’ Aboriginals in the Herald Sun newspaper in 2009 were in breach of section 18C of the Racial Discrimination Act 1975 (Cth) as the comments were likely to humiliate, offend and intimidate ‘fair-skinned’ Indigenous Australians. The next section of the paper traces the comments made by some columnists and politicians following the decision of the Federal Court of Australia. Broadly these columnists and politicians argued that the decision amounted to censorship and a curtailment of free speech.

It is argued that representations of ‘Aboriginality’ reflect the oppressive relationship between Indigenous Australians and the state/wider society. Historically, the classification of Aboriginal people was used by the Australian state to ideologically legitimize the incarceration of Aboriginal people and to separate Aboriginal children from their families. The media plays an important function in this process of classification. It is argued that aboriginal identity is linked to notions of self-concept and attachment rather than skin colour. Confining of the debate to solely freedom of speech ignores the immense power played by the media in the construction of racism in Australia. For Indigenous Australians, the Bolt case goes beyond
arguments about freedom of speech and directly impacts upon the question of who has the right to define the identity of Australia’s first peoples.

Facts of the case

In April and August 2009, Herald Sun columnist Andrew Bolt published two opinion articles in the Herald Sun entitled - “It’s so hip to be black” (Bolt, 2009a) and “White fellas in the black” (Bolt, 2009b). Both articles concerned ‘the identification of ‘fair skinned’ aboriginal people as Indigenous. In the first article, Bolt listed 16 Indigenous Australians, and inferred that some had identified as aboriginal for financial gain (Bolt, 2009a). The second article, (Bolt, 2009b) also related to the same theme and listed seven people, some of whom he again accused of identifying as Aboriginal for financial gain and furthering their careers. The language used in the articles was sarcastic and several factual assertions regarding the heritage of some of those named were incorrect. Bolt also asserted that the self-identification by such people as solely Indigenous adversely impacted upon ‘racial cohesion’ in Australia (Bolt, 2009a; 2009b)

In response to these articles, nine of the people named in the articles (Pat Eatock, Geoff Clark, Anita Heiss, Bindi Cole, Leanne Enoch, Graham Atkinson, Wayne Atkinson; Larissa Behrendt; and Mark McMillan) instituted legal proceedings against Andrew Bolt and the Herald and Weekly Times under section 18C of the Racial Discrimination Act (1975), Cth. They alleged that the publication of the articles by Bolt and the Herald and Weekly Times breached section 18C of the Racial Discrimination Act (1975), Cth (RDA), which reads:

“(1) It is unlawful for a person to do an act, otherwise than in private, if:

a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.”

Essentially, the plaintiffs had to prove that the conduct by Bolt and the Herald and Weekly Times was undertaken due to the race, colour or ethnic origin of the Indigenous people concerned and that it was likely that fair-skinned aboriginal people were likely to be offended, intimidated, humiliated or insulted by the conduct. Bolt and the Herald and Weekly Times on the other hand argued that the articles of April and August 2009 were written in utmost good faith and that the contents of the articles were in the public interest, and thus pursuant to section 18D of the Racial Discrimination Act. Section 18D of the Act provides that there are defences to a claim under Section 18C where any publication or comment is made in good faith and is in the public interest: “A fair comment on any event or matter of public interest is deemed as an expression of genuine belief held by the person making the comment” (s. 18D, Racial Discrimination Act 1975 (Cth) )
The Decision of the Federal Court of Australia

In a lengthy judgement delivered on September 28, 2011, Justice Bromberg ruled in favour of the plaintiffs. Justice Bromberg held that Bolt’s articles implied that ‘fair skinned’ Aboriginal people named in the articles were not genuinely from an Indigenous background and that the people named had falsely identified as Aboriginal and thus the contents of the articles were reasonably likely to offend, humiliate, insult or intimidate ‘fair skinned’ Aboriginals. Justice Bromberg stressed that each of the Aboriginal persons targeted by the articles did actually identify as Aboriginal and did not opportunistically use their Aboriginal identity for any material gain. That Bolt’s articles were written due to the race, colour or ethnic origin of the ‘fair skinned’ people referred to in Bolt’s articles and thus in breach of section 18C of the Racial Discrimination Act 1975, Cth. At paragraph 171 of the judgement, Justice Bromberg stated that: “It is a notorious and regrettable fact of Australian history that the flawed biological characterisations of many Aboriginal people was the basis for mistreatment, including for policies of assimilation involving the removal of many Aboriginal children from their families until the 1970s. It will be of no surprise that a race of people subjected to oppression by reason of oppressive racial categorisation will be sensitive to being racially categorised by others”. Justice Bromberg (at paragraph 296) emphasised that the articles written by Bolt had the potential to adversely impact upon vulnerable and younger Indigenous Australians so that that they could potentially fear or be pressured from identifying with their race.

Although Bolt argued that his aim in writing the articles was directed at ‘better race relations’ and that self-identification as Aboriginal was a trend which undermined race relations (paragraph 444), his defence based on section 18D of the Racial Discrimination Act was not upheld on the basis of the sarcastic language used and on the basis that the factual errors in the articles were of significance (at paragraph 302). For example, at paragraph 392, Justice Bromberg stated: “... the absence of any significant cultural reference in the newspaper Articles to the Aboriginal cultural upbringing of the individuals dealt with, leaves an erroneous impression. As I have found, each of the nine individuals who gave evidence have either always identified as Aboriginal or have done so since their childhood. They all had a cultural upbringing which raised them to identify as Aboriginal. The fact that this is not disclosed to the reader of the Newspaper Articles in any meaningful way creates a distorted view of the circumstance in which the individuals exemplified in those articles identify as Aboriginal”.

At paragraph 425, Justice Bromberg determined that the comments made by Bolt were not made in good faith: “What Mr Bolt did and what he failed to do, did not evince a conscientious approach to advancing freedom of expression in a way designed to honour the values asserted by the RDA. Insufficient care and diligence was taken to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct and insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice. The lack of care and diligence is demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides. For those reasons I am positively satisfied that Mr Bolt’s conduct lacked objective good faith.”
Bolt was not ordered to apologise as Justice Bromberg felt that there was no point of compelling someone to apologise when there was the absence in the belief for an apology. Instead, Justice Bromberg ordered that a 500 word corrective notice be published next to Andrew Bolt’s columns, twice over a 14 day period. (paragraph 468). Essentially such a notice is directed at redressing the esteem and social standing of the people

Reactions to the Bolt case: attack on free speech

Outside court on the day of the judgement, Bolt said that he wanted to go through the judgement before making conclusive comments. He however said “this is a terrible day for freedom of speech in this country”. “It is particularly a restriction on the freedom of all Australians to discuss multiculturalism and how people identify themselves”. “I argued then and I argue now that we should not insist on the differences between us but should focus instead on what unites us as human beings” (Bolt 2011).

The decision resulted in a barrage of opinion pieces by columnists and politicians. In an article appearing just 4 days after Justice Bromberg’s ruling, Bolt himself argued that he was not a racist and that his message was always consistent (Allan, 2011). News Limited columnist Brendan O’Neill, stated: “The terrifying thing that this ruling codifies is the idea that people’s feelings are more important than free speech. In short, the case confirms the modern-day sanctification of the Offended Minority, whose personal and emotional interests must override the rights of the rest of us” (O’Neill, 2011). On 29 September, Chris Merritt from the Australian wrote a comment piece, arguing that the Federal Court decision would “turn Australia into a nation of tribes… protected species too fragile to cope with robust public discourse” (Merritt, 2011).

George Brandis, wrote that section 18C of the Racial Discrimination Act "had no place in a society that values freedom of expression" (Brandis, 2011: 12). Former Howard Government Minister, Kevin Andrews argued that the Bolt case demonstrated "the dangers that flow from the assertion of groups rights" (Andrews, 2011). David Kemp argued in The Australian newspaper that section 18C of the Racial Discrimination Act was contrary to the principle of freedom of speech and called for the abolition of the Racial Discrimination Act as soon as possible (Kemp, 2011). Similarly, journalist David Marr argued that in a democratic society, vigorous public discussion can always insult or offend some groups and that Section 18C of the Racial Discrimination Act as it currently stands should be repealed (Marr, 2011)

Australia is a party to the International Covenant on Civil and Political Rights. Article 19 protects freedom of speech and states:

- Everyone shall have right to hold opinions without interference
- Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of their frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
• The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For the respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.

Section 3 (a) thus calls upon people to respect the reputation of others and to refrain from unsubstantiated attacks on others. Bromberg’s decision was that section 18C of the Racial Discrimination Act does not outlaw freedom of speech as has been proclaimed by some sections of the media and conservative politicians. Rather, it demands that any reporting be reasonable and conducted in good faith and absent of false claims and allegations. These matters were discussed by Justice Bromberg at paragraph 425 (discussed above) of His Honour’s judgement in the context of the Racial Discrimination Act. Justice Bromberg stated in essence that whilst democratic societies cherish the notion of free speech, they also impose restrictions on absolute freedoms which result in the deliberate vilification directed at individuals and groups.

There is now widespread discussion amongst academics, the legal profession and the wider community that section 18C of the Racial Discrimination Act as it currently stands is too broad and potentially unconstitutional. These concerns may have merit from a legal perspective but the merits of this discussion lie outside the scope of this paper.

Confining the Bolt case to arguments about free speech ignores the immense power exercised by the mass media in shaping and reinforcing public opinion (Bahnisch, 2011). Importantly, the Bolt case needs to be assessed from the perspective of Indigenous Australians.

**Mainstreaming Racism**

In Australia, the media continues to play a central role on the construction of what constitutes ‘Indigenous’ and who is seen as being ‘Indigenous’ (Bullimore, 1999; Mickler, 1997 and 1998). Historically, racist terminology, such as half caste, quadroon, half caste etc. was used to classify ‘Aboriginality (Langton, 1993). In modern times, resort to the racist language of the past is not palatable. Instead, the ‘Aboriginality’ of those who are ‘fair skinned’ is often questioned (Mickler, 1997).

Although notions of Indigenous identity have been contested (as is evident from Bolt’s articles), Indigenous identity does not relate to the colour of an Indigenous person’s skin or to their blood. Rather Indigenous identity is founded upon descent, culture, life experiences and upbringing (Paradies, 2006). It is premised upon perceiving oneself as Indigenous and being part of the Indigenous community. Descent does not involve “*genetics as inherited essential characteristics but to the historical connection that leads back to the land and which claims a particular history*” (Morrissey, 2003: 59). As Berry (1999) points out, in essence, the notion of identity is linked to the notion of self-concept, a sense of attachment: social identity is “*that part of an individual’s self-
concept which derives from one’s knowledge of one’s membership in a social group (or groups), together with the value and emotional significance attached to that membership” (Berry, 1999: p. 3).

Since the colonization of Australia, the white settler society has been ‘obsessed’ with the classification of Australia’s first peoples into ‘half castes’, ‘full bloods’, ‘hybrids’ etc, a practice which continues until today through the use of different terminology such as ‘fair skinned’. The concept of ‘Aboriginality’ has been historically used to ideologically legitimize state policies and practices to control and assimilate Indigenous communities and cultures. Yet in all of these classifications, the voices and visions of Indigenous Australians has been absent (Dodson, 1994).

Whilst the colonization of Indigenous Australians has had numerous devastating consequences, one of the most profound outcomes of the categorisation of Indigenous Australians has been the removal of Indigenous children from their families. It was widespread practice across Australia for Aboriginal children who were deemed as ‘half caste’ (that is part white) to be forcibly removed from their families into schools and missions so that they could become ‘civilised’ and thus live like other white people in mainstream society (HREOC, 1997). Haebich (2000) describes the removal of Aboriginal children as a widespread systematic nationwide process which not only was directed at assimilation but also the disintegration of Indigenous communities.

Modern racism is articulated through subtle language and rhetoric based on egalitarianism and liberalism (Van Dijk, 1987) (Jakubowiz, 1994; Mickler, 1998). Additionally, Simmons and Lecouteur (2008) state that “contemporary racism is typically accomplished in terms of subtle, flexibly managed and locally contingent discussion of the ‘problems’ associated with minority groups” (Simmons and Lecouteur, 2008: 667). In this context, the media, ‘initiate, monitor and control the majority and most influential forms of institutional and public text and talk....may set or change the agenda of public discourse and opinion making’ (Van Dijk, 1995:4 ). For Indigenous Australians, the Bolt case is not just a case about debates concerning freedom of speech, but one which is personal and essential to their self-definition (Bahnisch, 2011). An extract from Justice Bromberg’s judgement (at paragraph 171) highlights this significance: “It will be of no surprise that a race of people subjected to oppression by reason of oppressive racial categorisation will be sensitive to being racially categorised by others”.

It is for this reason that the plaintiffs most likely took an action under the provisions of the RDA rather than one based on defamation. Had the plaintiffs initiated a defamation action, there is every possibility that they would have succeeded and the consequence of a success would have been much more adverse for Bolt and the Herald and Weekly Times. Both Bolt and the Newspaper would have likely to be ordered to pay substantial monetary damages (Bahnisch, 2011). The Plaintiffs most likely chose to initiate legal proceedings under the RDA as an attack on ‘fair skinned Aborigines’ goes beyond the personal grievances of the plaintiffs themselves. The plaintiffs were thus concerned with utilising the RDA to protect Indigenous Australians from being vilified by the media (Bahnisch, 2011) and enabling them to assert their own right to identify with their culture and heritage.
Hall points out that when journalists select information to include in a news report or an editorial piece, they assert their professional judgement and values – thus their professional ideology (Hall, 1981). Various rhetorical practices are commonly utilised to legitimate racism. These include the denial of any intention of racism (Van Dijk 1993) and the invoking of egalitarian and liberal principles (Augoustinos, et. al, 2002). Although the manner in which social problems are constructed and portrayed by the media impacts upon the public’s perception and understanding of those issues (Thomson & Ungerleider, 2004; Farquharson & Marjoribanks, 2006; Van Dijk 2002, 1988; Augoustinos & Every, 2007; Morris, 2005), journalists often deny that they have made racial and incriminating statements and deny that they had any such Intentions (Van Dijk 1993: 180). Rather, they often go on the defensive and state that they have been understood inaccurately and that they are claiming to tell the truth as the journalist saw it (Van Dijk 1993: 180, 183, 184; Van Dijk 1988: 223-224; Liu and Mills, 2006; Augoustinos & Every, 2007)

In their analysis of the Bolt case, Hirst and Keeble’s paper summarises the stance taken by Bolt and the impact of such a stance: “Bolt’s discourse follows the classic lines of ‘symbolic racism’; denial of racist motivations; the imputation of a racist motive to critics and the subjects of the story and the representation of the ‘myth of privilege’ in regards to indigenous Australians” (Hirst & Keeble, 2011: 8). Quoting Van Dijk (1983), Hirst and Keeble assert that “Bolt’s plea to identity allegiance to white group solidarity coupled with strategies of denial of racism,” “have a socio political function, delegitimising the need for the measures to combat racist attitudes. Van Dijk states that denials, “challenge the very legitimacy of anti racist analysis….. as long as the problem is being denied in the first place, the critics are ridiculed, marginalised and delegitimated” (van Dijk 1993: 181; Hirst & Keeble, 2011: 8-9).

Conclusion

The Andrew Bolt case is important from a number of perspectives. Firstly, it has revealed the falsehoods in Bolt’s articles. In the words of Thampapillai, “if the articles stood unchallenged, these falsehoods would have remained on the public record. A Democracy must be a marketplace of ideas, but no market prospers when false claims go unchallenged” (Thampapillai, 2011: 2). Secondly, the case should not be looked at solely from the narrow confines of a limitation of freedom of speech. It has been argued that the Bolt case concerns the application of the Racial Discrimination Act in the public interest (Hirst & Keeble, 2011). The case has prompted debates on whether the provisions of the Racial Discrimination Act are too broad and there is no doubt that this matter will continue to be debated in Australia.

Thirdly, the case is significant as it concerns a minority group’s freedom to define its own identity. The issue of racism continues to be very significant in Australia. Racism continues to be articulated through the media in a more subtle manner, under the cloak of fairness, privilege and equality. Whilst the judgement in the Bolt case will not alter racism in Australia or the structures which perpetuate racism, the decision and legal reasoning can and should be used as an educational tool to combat racism.
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