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Freedom of Speech and the Limits of UK Criminal Legislation

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ABSTRACT

This article draws attention to the fact that while the application of criminal law may serve to punish racially aggravated offences where they can be proved, such legislation in themselves do little to address the causes or, to limit the occurrence of racially motivated attacks (or 'hate crimes' in American legal parlance). Our analysis is undertaken in the background of UK legislation and the lessons from two UK television programmes which reawakened the debate on the use of hate speech and the recourse to criminal legislation in tackling human rights issues. The essay is in three parts. Part I examines the two television programmes referred to above – reviewing the application of relevant criminal legislation to the allegations therein and the impact of the media's action in these circumstances on the race relations debate in the UK. Part II assesses whether criminal legislation can in the circumstances effectively counter racial prejudice. Part III examines the need for education and social action including whether UK legislation needs to put more effort into finding more enduring alternatives to criminal legislation in its bid to maintain a fair and tolerable society.

I. INTRODUCTION

National governments have been keen to adapt human rights provisions to their internal legal systems for purposes beyond compliance with human rights international standards. The central aim of this domestic application of international human rights principles in the increasingly diverse communities of the modern world is for the purposes of social control. With increased diversity, States are understandably keen to maintain the peaceful co-existence of all members of society.

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In order to do this, legislation has moved from the internal adoption of human rights provisions to the use of criminal legislation in order to address the incidences of racially aggravated offences. Such legislation includes the establishment of criminal punishment for acts or commissions which are considered to be racially motivated.

In general, 'hate crime' encompasses criminal acts which are motivated by no other cause than a feeling of hatred for another person, or a group of persons. Such hatred can be against another's colour, creed or religious belief, sexual orientation, language. Of all these, those actions based on an attack of racial are the most easily identifiable specifically because of the physical differentiations which characterise and emphasise racial differences – colour, hair texture, physique, etc. In modern multicultural societies, owing to the increase in geographical mobility and international immigration, racial discrimination has acquired even more notoriety than ever before. The *September 11* bombings in the United States, the *Bali nightclub bombings*, the *July 7 attacks* on the London tubes; all incidents of which recorded unprecedented fatalities, and the ongoing [military] action against suspected terrorists, have given rise to more than an awareness of terrorism. These incidences sadly but inevitably reignited the suspicion and, racial discrimination between persons of different identities not only across diplomatic ties, but within societies and, amongst private individuals.

In the aftermath of the above mentioned 'acts of terror', domestic legislation has had to give stronger consideration to the need for balancing individual rights. UK legislation has also focused on identifying the right of a person to be free from racially motivated attacks even as it preserves the freedom of expression to its citizens under its Human Rights Act (HRA). In employing criminal legislation as a principal means of tackling racially aggravated offences, we argue that there is a curious neglect of the

fact that individuals' emotions cannot and ought not to be coerced by law. Individual prejudices are formed out with the purview of law; they arise in the psyche and are encouraged by the society the individual finds himself or herself in. The debate on racially motivated crimes therefore falls on either side of the question on whose rights hold greater value before the State?

On the one hand, it could be argued that 'freedoms' also include the right of a person to freely express one's like or dislike of another. This freedom should thus extend to a 'right' not to be punished for acts which are merely expressions of an individual philosophy and should not be construed as racially discriminative and therefore criminal. On the other hand, it could also be argued that every person has a right to expect freedom from such discrimination and for protection from the State. Both of these arguments assume that the States has a duty to prevent harm to others in this instance by admitting that whereas an individual may hold an objectionable view, such a view will be punishable under criminal law in order to prevent the harm it may cause to others.

Kahan (2001, p.175) is of the view that these opposite perceptions arise in the shadow of 'the Millian premise that the state is justified in coercing an individual only to prevent harm to others and not to condemn that individual for holding objectionable views, values or preferences'¹. Various academic arguments have examined the use of criminal legislation to address racially motivated attacks² and we need not restate them. Our present concern however rests on the premise that greater emphasis ought to be placed on civil regulation and projects which promote the inalienable right to dignity as an appeal to the faulty reasoning and emotions which give rise to racist and other 'hate' behaviour.

Race legislation and the criminal punishment attached do not address the real or imagined threats often underscored by long festering racial prejudice which predispose one to race discrimination. Furthermore, although criminal punishment can 'punish' the offender, it is not sufficient to 'deter' further offences indeed it can even lead to a deeper hatred of the victim by the one who feels unjustly punished for expressing a private opinion.

What is crucial here is for the State to review the option of appealing to reason; for domestic policies which go to the core of racist action. It is important that domestic government must include and protect in national laws, the individual's duty to respect the fundamental right of every person to be treated with dignity. Holding up this right as moral and inalienable and for the benefit of all in the society can assist in curbing the spread of a misguided sense of supremacy and that lack of respect for others which even if not brought to the fore in the public domain (in order to avoid legal retribution) is given free rein in private human interactions, daily. Legislative force should therefore be given to those other positive action including education, inclusive diversity programmes, media regulation, and increased access to minorities; cultural policy which can prevent the often tragic consequences of racially aggravated behaviour when they occur between private individuals.

These views are assessed in the background of the debates on race relations in the UK reignited by two incidences brought to public attention by the broadcast media. These programmes highlighted the more prevalent instances of racial behaviour; instances which are practically endemic in modern Britain. Given the private context of the racial behaviour in both instances, the failure of a finding for criminal punishment for the 'offenders' in the course of the judicial process, in our view buttresses the fact that criminal legislation is not the sufficient answer to tackling race

crimes on the long run. The first is the UK Channel 4 programme, *Celebrity Big Brother (CBB) UK 2007* and the second, *The Secret Agent*; a BBC documentary (secret filming) of a meeting by the British National Party (BNP) in January 2004, which became the subject of a legal dispute in November 2006.

PART I. LESSONS FROM TELEVISION

1. 'Celebrity Big Brother (UK) 2007' and 'The Secret Agent'

The reality programme *Celebrity Big Brother UK* (2007) was aired between 3rd-28th January 2007. The programme which had erstwhile suffered a decline in viewing ratings, increased its falling standards after a controversial and topical public debate arose from the relations between one of the participants and a group of others³. The public was shocked at the harassment and the obvious distress which one of the participants in the programme suffered when she was subjected to 'racist bullying'⁴. Outrage was also directed at the programme's producers and the bosses of Channel 4 who had allowed the abuse to go on and had distastefully aired the altercations.

The UK version of the *Celebrity Big Brother Series* in its 7th season invited a host of media recognisable personalities (*aka* celebrities), in January 2007. One of the housemates was an actress who was from and lives, in India⁵. As part of its usually unforeseen adaptations to the programme, the producers invited a new participant⁶ who had previously been on the original *Big Brother* format and who had as a result of her previous appearance become a celebrity in her own right, to return as a new housemate on the *Celebrity 2007 series*.⁷

In the course of their seclusion while under constant surveillance, the watching public was treated to a sequence of harassing and abusive behaviour against Ms Shetty, by Ms Jade Goody and two other housemates, Ms Danielle Lloyd and Ms Jo O'Meara.

These included:

Following a discussion the group had with Ms Shetty about how long it took to cook a chicken, Goody, O'Meara and Lloyd decided she had made them all ill. "No wonder I keep getting the s***s," commented O'Meara.

Others complained that Shetty had touched housemates' food with her hands after she picked up morsels from people's plates with Lloyd saying: "You don't know where those hands have been."

In a row between Ms Goody and Ms Shetty, responding to the latter's statement, "You need elocution lessons", Ms Goody stated, "You need a day in the slums. F***ing go in your community. F***ing go in your community and go to all those people who look up to you and be real.

Danielle Lloyd speaking out of earshot from the actress, said, "I think she should f*** off home."⁸

The use of swear words, insults, abusive comments and the complicit laughter of other housemates have not been denied by the broadcasters. Rather Channel 4 claimed that the behaviour was due to 'a clash of cultures and class'⁹. The official broadcast regulator *Ofcom*, saw an unprecedented 27,000 records of complaints about the programme after Hertfordshire police under whose precinct the programme was being made had reported 30 telephone calls complaining against the broadcast¹⁰. The main accused housemate in her media interviews did not deny her actions were wrong.¹¹ Other social commentary has not hesitated to condemn the attacks while calling for a more incisive review on the state of race relations in the UK.¹²

The second programme involved top officers of the British National Party (BNP). The Party has a history of accusations of racism and intentions to stir hatred beginning with its founder John Tyndall and the BBC documentary exposed current racist thinking within the organisation¹³. On 10 November 2006 in the Leeds Crown Court, the leader of the BNP, Nick Griffin was acquitted along with a colleague on the charge that he had intended to stir up racial hatred by the contents of a speech made to supporters on 19 January 2004. The BNP, a far right political organisation founded in 1982 includes in its mission statement that the party 'exists to secure a future for the indigenous peoples of Britain and others of similar Caucasian ancestry.

The party argues that these people, 'are facing denial of service provision, failure to secure business contracts as well as poor job prospects as both reverse discrimination excludes [our] people from the school room, workplace and boardroom'¹⁴. The Party stance on immigration gives an insight to the philosophy behind the mission statement. The BNP seeks 'an immediate halt to all future immigration' including the repatriation of all non-white Britons to their countries of origin asserting that "positive discrimination" schemes have 'made white Britons second class citizens'¹⁵.

The BBC documentary filmed a meeting of the BNP in secret by an undercover reporter¹⁶. There, the BNP leader, Nick Griffin stated that Islam was a "wicked, vicious faith" and that Muslims were turning Britain into a "multi-racial hell hole". His colleague, a Mr Colette, at the same event said, "Let's show these ethnics the door in 2004."¹⁷ In his defence, Nick Griffin's barrister argued that the words were part of a "campaign speech of an official and legitimate party."¹⁸ The speech was made in private, to a group of people and only came to public attention because it had been

aired by the BBC in April 2004. In its statement, the broadcaster defended its action stating that it was its job to bring such matters of public interest to general attention.

Bringing the matter of racism and the moral dilemma it presented to general attention was certainly what the two programmes achieved. Yet it was not only the incidences of alleged racial abuse that were brought up for consideration. Many also questioned why the broadcasters in the respective circumstances, brought the programmes to public attention. After all, in the case of the BNP, its policies were already well known and were in fact available on the party's web site. Could the makers of the *Celebrity Big Brother* programme not have shielded the public from the unpleasantness between the inmates?

2. The Importance and Effect of Media action

The importance and effect of media action in the realm of race relations must be acknowledged because although the media is expected to be objective and factual in its reports, those who bring the news to public awareness also have 'the power to marginalise and construct racial or ethnic minorities as "other"...'¹⁹ ; a 'power [that] comes from the capacity to make connections, to represent events or issues in the context of pre-existing fears or prejudices.'²⁰ Therefore it is certainly proper that the public should ask these questions: Was there a deliberate intention by the Television channels to exacerbate racial tension for the sake of improved viewing? Were these programmes put out to the public because the issues raised were as the *BBC* maintained, for the benefit of public enlightenment?

Reviewing the action of the media in bringing these programmes and the social prejudices they portrayed in our view we find that the media acknowledged the existence of deep seated prejudices existing in multiracial Britain. What the media did

with these two programmes was to haul the race relations debate onto the centre stage. Racial abuse or 'hate crime' was therefore no longer a matter for the courts and the legislature alone. The public was also included. Solomos J and Back L (1996) have suggested that press coverage of events do a service in arousing 'wide ranging debate about the future of race relations in British society'.²¹ This opinion is echoed in a later UK Home Office study on racial harassment which stated that '[N]o other group of individuals have as much power as the media to affect the image that people have of members of the ethnic minorities' and warned that '[U]nbalanced and inaccurate reporting...can all too easily provide a spurious justification for racial harassment'.²²

In respect of both Channel 4 and the BBC, it cannot be denied that the television media successfully kept the issue of race relations in the public domain. In doing so, both broadcasters went a step further than the usual media coverage of incidences wherein racial discrimination has been suspected to be the motive of aggravated attacks. Without focusing solely on the victim and the consequences of the attack on the latter, the reality programme *CBB UK 2007* allowed the public a rare opportunity of immediately identifying the perpetrators of the alleged racial offence.²³ The same could also be said of the BBC broadcast, *The Secret Agent*, which not only identified the political group behind the statements ie the BNP, but also identified the particular members of the party who had made the statements.

In our view, deciding therefore if the television channels were only fulfilling their obligation of public enlightenment or whether the programmes deliberately stirred up racial hatred presents no difficulty. In airing the reality programme, *Channel 4* appears to have acted within the Code of Broadcasting applied by the regulatory body *Ofcom* giving the programme the necessary legitimacy demanded of the

broadcaster in its choice of programmes for public viewing. Section 2, Part 2 of the *Ofcom Code 2005* states:

In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context.... Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example, on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation)...

The 'context' referred to here covers matters such as the editorial content of the broadcast; the time and service of the programme, the likely size, composition and expectations of the potential audience; the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in the programme.²⁴ Reality programmes have to be put in their proper context. They are a peculiar genre of Television broadcasting designed to give a real insight into the characters who are part of the programme. While careful editing of the contents of television programmes should take away the parts of a programme which would cause offence as the *Ofcom Code* provision immediately above seeks to avoid, by their very nature, reality programmes cannot comply with these expectations without compromising on the promise to deliver 'reality'.

Scrupulous editing can have the undesirable effect of making a 'reality' programme, a 'normal' one, limiting the number of viewers who tune into the programme precisely because they want to know what is going on when other people (particularly well known people) place themselves and their private actions in public view. By accepting to be part of a media programme of this nature, it is only reasonable to assume that participants ought to have been aware that their words or actions would be subjected to public (and legal) censure.

In respect of the role of the BBC in bringing to the public awareness the meeting of the BNP, the BBC Royal Charter includes in the terms of the said legal instrument, that the BBC exists 'to serve the public interest' and that the Corporation's main object was 'the promotion of its public purposes.'²⁵ These public purposes which include 'sustaining citizenship and civil society' and 'promoting education and learning' are to be achieved 'through the provision of output which consists of information, education and entertainment'.²⁶ The political nature of the comments by the BNP party leaders affirms the action of the *BBC* in consonance with its legal Charter. Informing the public of the philosophy and thinking at the background of such a public body as a legitimate political party can only be construed as beneficial to the electorate who have a right to know the agenda of any political group which requests the public mandate.

In both circumstances, an important distinction must be made between a broadcaster 'intent to stir up racial hatred', and the 'intent to bring certain facts relating to racial hatred' to public attention. In their respective contexts, a 'reality' programme and a secretly filmed 'documentary', should present the matters as they are. This of course means that just as there are unpleasant reports in the media every day, contents of certain television programmes which focus on personal private behaviour may evidence facts which will be distasteful to some members of the public.

Therefore, the argument by both the BBC and Channel 4 respectively, that each broadcaster was fulfilling its legal and commercial obligations outweighs any counter argument that in these instances, the broadcasters intended to stir up racial hatred²⁷. The importance of these media events should not be underrated. While it may have

been more pleasant to rest on the ignorance of the pervasiveness of racially aggravating behaviour, public enlightenment has here created an awareness which ought to spur the State in particular and the public in general to concrete action towards protecting the dignity of each individual in the society.

PART II: CAN CRIMINAL LEGISLATION COUNTER RACIAL PREJUDICE?

1. *CBB UK 2007*

In the above context, the principal accusation was that the victim was subjected to 'racist bullying'. There was no doubt that isolating the victim; speaking about her in a condemnatory and discriminatory manner and doing so with the support of other persons must have put Ms Shetty in an unenviable position. In the course of investigations into the allegations and complaints of racial abuse, three provisions of criminal law were cited as being relevant to any legal proceedings in respect of the incident: the *Crime and Disorder Act* (1998); the *Protection from Harassment Act* (1997) and; the *Public Order Act* (1986). Were any of these provisions actually sustainable against those accused of racial abuse in the *CBB* programme including the broadcaster itself? Are these provisions in themselves sufficient to counter the racial prejudice alleged in the interpersonal dealings of the programme participants? We examine these questions.

a. The Crime and Disorder Act (1998)

The *Crime and Disorder Act* (1998)²⁸ does not expressly state that 'racist bullying' which was what was complained against in the *CBB* programme amounts to an offence. S.28(1) of the Act identifies racially aggravated behaviour as where a person demonstrates hostility towards the victim based on the victim's membership of a racial group. S.28(4) identifies a "racial group" as 'a group of persons defined by

reference to race, colour, nationality (including citizenship) or ethnic or national origins'. Certain conduct can constitute racially aggravated offences including assaults (S.29), criminal damage (S.30), public order offences (S.31) and harassment (S.32).

The importance of this clarity in identification by criminal legislation on what would constitute an offence under the legislation cannot be overemphasised. Saucier et al (2008) in a recent study note that '[H]ate crimes are crimes committed against individuals because that are perceived to be members of a particular social group. Their perceived membership in that group, not anything idiosyncratic about them as individuals makes them vulnerable'²⁹.

It must immediately be pointed out that the complaints in this instant referred to statements/speech made by the accused housemates. Under the provisions (for England and Wales) cited above, 'speech' has not been expressly included as potential racially aggravated conduct. In our view this leaves a *lacuna* in the criminal provisions addressing racist behaviour in England and Wales, as it denies the harmful effects of racially motivated speech. We find that the Scottish laws have noted this lacuna. In the provisions on racially aggravating course of conduct which amounts to a harassment in Scotland, S.33 of the *Crime and Disorder Act* expressly states in an amendment to the Criminal Law (Consolidation) (Scotland) Act 1995, that racially aggravating 'conduct' includes 'speech'.

Since the *CBB* affair originated in England, we will primarily address the provisions as they relate to England and Wales. Were the derogatory remarks against Ms Shetty made because she was Indian? Was she badly treated because she was a member of a particular social group? We cannot affirm that the treatment meted out

was based on these considerations. For a criminal charge to be sustained, *mens rea* or *criminal intent* would have to be proved against those accused in the first instance. The difficulty of proving *intent* in such emotive circumstances has previously been examined. (Steiker 1999; Dillof 1997; Robinson, 1992). What is pertinent in our present deliberations is that as Hurd (2001) notes, 'it is possible to feel hatred towards particular persons...without being disposed to feel hatred towards groups of persons generally...'.³⁰

The Act states that an offence is committed where hostility is shown to a person because that person is a member of a particular group. Therefore to be racist, 'is to be disposed to believe that members of another race are inferior, and to act in ways that subjugate such persons'³¹. For those who watched the incidents (and I did) what was apparent was that the other girls felt uncomfortable with the foreigner's mannerisms, her surprisingly excellent grasp of English and the fact that she seemed rather popular with the older men in the house! The hostility stemmed from these facts alone.

We believe that the words and behaviour employed were only in keeping with what they (the accused housemates) would normally do if faced with such a situation³². We recall that the *Crime and Disorder Act* itself does not suggest that all aggravating behaviour because they are shown to someone of a different race will necessarily constitute an offence without a show of hostility towards that other based on the latter's membership of a racial group. Even if the others accused of racially aggravating behaviour were in their private consciences disposed to believe that members of Ms Shetty's race were inferior, their actions in the programme though terrible, in no way reflected a hatred of Ms Shetty's race. For this reason, we are of the view that even if the provisions of Scotland were applicable in the instant matter,

the speech ie statements of the accused housemates would still not amount to an offence under the *Crime and Disorder Act*.

b. The Public Order Act (1986)

S.31(1) of the *Crime and Disorder Act* further provides for racially aggravated public order offences. It states that a person is guilty if that person commits any of the following offences which is racially aggravated:

- (a) an offence under section 4 of the Public Order Act 1986 (fear or provocation of violence);
- (b) an offence under section 4A of that Act (intentional harassment, alarm or distress); or
- (c) an offence under section 5 of that Act (harassment, alarm or distress),

The *Public Order Act*, Sections 17-29, cover the instances of racial hatred. S.17 defines racial hatred for the purposes of the Act as ‘...that hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins’. Instances of racial hatred could arise in the course of or under any of the following: words, behaviour or written material (S.18); publication or distribution of written material (19); public performance of a play (S.20); distribution, playing or showing of a recording (S.21); broadcast of a racist programme service (S. 22).

Did the fact of the programme’s display to the public make these provisions any more relevant to the incident? Are they enough to presume culpability on the part of the broadcaster who published the programme? We do not think so. The semblance of privacy given to the participants on CBB in the secluded Big Brother House would have contributed to making the housemates relax their guard and react in their typical fashion to confrontations with their fellow housemates. They were in a private

dwelling. They would expect that what they said to each other was only between them. On this particular occasion, the broadcaster, Channel 4 would have been of the same view and rightly so. It was merely providing the public with the day to day activities of the housemates in line with the format of the programme.

There is also a further reprieve for the housemates accused of racist bullying, under an amendment to the Public Order Act ³³ where a person is accused of causing intentional harassment, alarm or distress. Sub section.4A(3) of S. 154 of the *Criminal Justice and Public Order Act (1994)* provides that in such cases, it is a defence for an accused to prove that his conduct was reasonable because being inside a dwelling, there was no reason to believe that the words or behaviour would be seen or heard by a person outside the dwelling. Should any of the persons accused of racist behaviour in the Big Brother House have believed that their words or behaviour would be so seen or heard?

Regardless of the constant surveillance in the Big Brother House and although the participants knew of this surveillance, it could be argued that none of the housemates saw themselves as being in the same building with the viewing public. They were to all intents and for the purposes of the programme, living a 'normal' life in the privacy of the Big Brother House. They were being filmed for a reality television series which by implication, meant that they related with each other as they normally would, 'inside a dwelling'.

c. The Protection from Harassment Act (1997)

Sections 1-3 of the above Act provide that it is an offence for anyone to pursue a conduct which amounts to the harassment of another and which is known or ought to be known would amount to harassment of that other. However, in the context of the

instant incident, we must return to certain exceptions relevant here which arise under the previously mentioned amendment to the *Public Order Act*, dealing with the provisions on harassment³⁴. The amendment states that harassment is a criminal offence where a person causes another harassment, alarm or distress by 'using threatening, abusive or insulting words or behaviour or disorderly behaviour' or 'displays any writing, sign or other visible representation which is threatening, abusive or insulting'. This provision is however qualified by the location of the persons involved and the potential of any threatening, abusive or insulting words or behaviour, to be seen or heard by person outside the building. It states:

An offence under this section may be committed in a public or a private place, *except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.*³⁵

All the persons involved in the rows were inside the Big Brother house, at the same time. No verbal abuse or racial comment was directed at any other person or group, apart from the housemate who was the victim of the ill treatment. The public viewers of the programme including any who were members of Ms Shetty's social or racial group although they were privy to the activities of the housemates, were technically not inside the Big Brother House, ie the building. Therefore, it could not be said that the public was physically present when the alleged offence was committed so as to bring the relevant provisions of the Public Order Act to bear on the *CBB* programme.

In the final analysis, criminal legislation proved ineffective both in theory and in practice in respect of the allegations of racist behaviour in *Celebrity Big Brother UK 2007*. No charges were brought either against the persons accused of racist

behaviour or against Channel 4. We will consider the second programme next to examine the effectiveness of criminal legislation as applied to that circumstance.

2. *The Secret Agent (the BNP case)*

This programme and its contribution to the race debate in the UK appears simple and clear cut, on the face of it. The BNP leader and his colleague Mr Collette were charged before a Leeds Crown Court for their statements in the secretly filmed meeting, on charges of incitement to racial hatred pursuant to the *Criminal Justice and Public Order Act 1994*. In his summation to the jury before the latter retired to deliberate on their verdict, the presiding judge offered the following opinion:

We live in a democratic society which jealously protects the rights of its citizens to freedom of expression, to free speech. That does not mean it is limited to speaking only the acceptable, popular or politically correct things. It extends to the unpopular, to those which many people may find unacceptable, unpalatable and sensitive.³⁶

The jury returned a verdict of acquittal.

The facts of this programme in our view, reveal a far more harmful incidence of racially aggravating behaviour than in the *CBB* case above. Mason G (2007) referring to previous discourse on the subject, acknowledges that there remain controversy over how the concept of hate crime should be defined. We are partial to the view that criminal conduct motivated by prejudice will suffice as evidence of hate crime. (Jacobs & Potter, 1998, p.11). We have noted that the Scottish provisions on racially aggravated conduct under the *Crime and Disorder Act* include 'speech'. This in our view is the better approach to tackling racially aggravating behaviour at its roots.

Speech is the most frequent expression of misconduct in relation to racially aggravating behaviour. It is also the most basic. Next we examine the two incidents

from television and consider whether indeed criminal legislation as it stands will suffice to counter the primary signs of racial behaviour typified by racially aggravating statements or speeches.

3. The Limits of Criminal Legislation in both incidents

In comparing the application of criminal punishment to both cases above, in both situations, persons have expressed themselves in an insensitive and offending manner; both situations were only brought to public attention by the television based on the media's opinion in the respective circumstances that the events were appropriate for general attention. Both situations also arose out of private interaction. However, the BNP case clearly reflected a disposition of hatred towards a particular group (Muslims) and a feeling of superiority over that group. We analyse the rationale behind a verdict of acquittal in this case:

It will be noted in the first instance that the charges brought against the BNP party officials were that the men 'used words or behaviour intended to stir up racial hatred'. They were not charged for racially aggravating behaviour *per se*. We hold that this was an inadequate assessment by the prosecution of the facts of the matter based on the weakness of the criminal legislation provisions for racial crime. The *Crime and Disorder Act* (1998) primarily provides for racially aggravating offences as arising where a person demonstrates hostility against a person or members of a racial group. Since the statements made by Nick Griffin and his colleague were *about* a religious group and unlike the *CBB* housemates' racist taunts were not made *directly* to any members of the group (Muslims) under attack, it is obvious that the provisions of the Act would not apply in this matter.

The words uttered by both BNP officials were clearly evidence of their hostility towards Muslims. To deny this would be clearly disingenuous. How can a political

party and its officials clearly state that a group of persons are turning a country into a 'multi-racial hell-hole' and seek to expel these persons and yet be found to be without hatred? Or is it likely that the officials believe Islam is a 'wicked, vicious faith' and yet feel no hatred for the adherents of the religion?

The terrorist videos shown in the UK and beyond in the aftermath of the USA September 11th and the London July 7th bombings are always held up by both States as evidence of 'hatred' of the West by the terrorist. In the current trials of the persons accused of aiding the London bombings, videos denouncing the West and Western international political activity, life styles etc, have been held up by the Prosecution as evidence of intention to engage in terrorist activity, no doubt a racially motivated behaviour. Will it therefore be right to dismiss such private videos because they are not intended to stir up hatred being addressed only to persons of a like mind? Is the right to free speech without a limit in consideration of the use of words which will constitute racial abuse?

We note that although it was not referred to in the instant case, it is important to mention also the recent *Racial and Religious Hatred Act 2006* because of its significance in the UK race relations debate. This Act broadens the scope covered under the 1976 *Race Relations Act*, (as amended in 2000) by including the use of 'threatening' words or behaviour against another on the basis of race or religion as a criminal offence.³⁷ However, the Act limits the offences under the legislation to those involving the use of threatening words to incite hatred. Words which may be abusive, critical or insulting do not come under the scope of the Act and the burden of proof rests on the Prosecution to prove criminal intent.³⁸

We find that even this Act given its scope will not address our concerns with how much impact speech has in its potential to give rise to racially aggravating behaviour.

For one, there is the presumption of a criminal offence only where there is a 'victim' as opposed to where a statement is made without causing offence to those who hear or perceive the action. Also, the action or words must be made in a 'threatening' manner to this victim or group of victims; neither of which applied in the Nick Griffin case. As in BNP case therefore, without the proof that the contested words were made in a threatening manner to any particular victim or group of victims, there would still have been no sustainable charge against the BNP officials.

Be that as it may, the verdict of acquittal in the BNP case more than in the *CBB* matter, reveals the limitations of criminal legislation to tackle racial discrimination. *First*, current legislative provisions do not incorporate the probability that racially aggravating words or behaviour are frequently made in the absence of the group to which hostility is targeted. This means that even children and other minors can be constantly exposed to racially inciting statements from persons in a position of authority. *Second*, the greater duty of care which arises with the responsibility of all persons in public office (politicians, teachers, civil servants, pastors, etc) to maintain social cohesion by refraining from insensitive and inflammatory remarks is not addressed by legislation.³⁹ The freedom to hold private beliefs including political beliefs must be contained if such beliefs include manifest hatred and feelings of superiority against others. *Third*, the State must bear in mind that criminal legislation may in certain cases punish offenders under the due process of the law. However, the multiracial societies of the modern world must go beyond legislative means of controlling incidences of racial conduct, including speeches. Greater action by civil regulation promoting harmony amongst the diverse groups in society need to be adopted in order to address the deep emotional and psychological prejudices which lead to racism.

PART III: A MORE ENDURING ALTERNATIVE: EDUCATION AND SOCIAL ACTION

1. Tackling the roots of racism: When should free speech be limited?

Without impeding the freedom of expression of every person, the law must find evidence of an intention towards racist action in order to hold that a person is rightly accused of racially motivated behaviour particularly when such behaviour is manifest only as speech. It is this unwillingness to categorise all unpleasant speech as criminal that finds international legal instruments recognising the right to freedom of expression⁴⁰.

We accept that it is important to protect the individual's freedom to speak without fear of oppression from (il)legitimate authority or, without undue sensitivity to what others may find objectionable. We wish to draw attention however to the fact that not the root causes of prejudice or hate which subsequently overflow to criminal acts must be addressed by domestic authorities as well. As we mentioned earlier, the law cannot force emotions. But regulation and social action can aid a social re-think amongst a diverse society. Often there argument such as was stated by the judge in the BNP case above is offered as a justification for the right of every person to express themselves. An individual may be free and have the right to expression, but such freedom must yield to another person's right as well.

Our point here is that the law and the courts must recognise that there has been a misuse of the freedom of expression when such an expression is motivated only by reason of the victim's race and thus becomes 'hate speech'⁴¹. In this respect, we are of the view that although the judge in the BNP case had also counselled the jury that the rights granted by the freedom of expression were accompanied by duties not to abuse those rights, his statement above was not sufficiently clear on the requisite

limits to free speech. The statement also did not take into account the peculiar nature of race relations. It also ignored the capacity of privately held opinion including the private opinion of organisations and political groups (which sadly now include terrorists) to incite racial hatred.

This judicial error in not finding the BNP statements as 'racist' and 'likely to stir up hatred' perpetuates further errors in appropriately identifying and punishing hate speech and crimes⁴². These errors are:

- a. Error in identification of what constitutes racist behaviour amongst private persons: The immediate reaction to an allegation of racist behaviour is for the person accused to state categorically, "I am not a racist person" which begs the question whether racist behaviour is a characteristic or personality trait, which it most certainly is not.
- b. Error in distinctions of what can or; cannot, be said: Here, there is an underlying assumption wrongly held, that freedom of expression implies a license to free speech in the most literal sense. This is also not a correct interpretation of this category of political rights. Quite rightly, freedom of expression enables a person to speak without fear of harassment by government or any other group which seeks to restrict a citizen's right to participate freely in a democratic society. However, freedom of expression is not a grant of licence to attack an individual or group identity; or to rob another person of that equal right to respect and human dignity.

These errors have become conditioned into society – that racist remarks do not make a person racist; only serious attacks would suffice such as killing other persons of a different race or destruction of their property, a fundamentally flawed and by implication, dangerous perception of race discrimination.⁴³

In *Handyside v United Kingdom*, the European Court of Human Rights (Eur Ct H.R) laid down a deciding statement on the question of an individual's right to express himself including for speech which is adjudged to be offensive. In that case, the applicant had complained of a violation of Art. 10 on Freedom of Speech in the ECHR, in respect of a prosecution against him under the UK Obscene Publications Act 1959 (as amended, 1964). The Eur Ct H.R found a *prima facie* violation of Art. 10, which had occurred in the government's seizure of the applicant's materials, stating its reasoning as follows:

Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.⁴⁴

However and more importantly, the Court ultimately held that there had been no violation of the freedom of expression because subject to Art. 10(2) which provides that the right is subject to certain restrictions 'prescribed by law and necessary in a democratic society', the publication included "sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences."⁴⁵ Thus the UK government was within its rights to restrain the publication and had not violated the Applicant's freedom of expression by doing so.

In propagating the right to freedom of expression, the legal limitations to this freedom, as it concerns us in this particular discourse, that referred to in Article 10(2) ECHR

'for the protection of the reputation or right of others', and the ramifications thereof particularly where the media are involved, are of critical importance. In *Jersild v Denmark*⁴⁶, an application was brought to the Eur Ct H.R by a journalist, Jersild, who had been convicted under Danish law for a television interview conducted with a group of youths, the Greenjackets who had used the opportunity to make racist remarks on minority groups in the country. The Court acknowledged that the racist remarks by the youths "were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10"⁴⁷.

The Court held contrary to the opinion of the Danish Supreme Court, that Jersild being a journalist, had indeed been serving the public interest by bringing to attention the fact that there were neo Nazis in Denmark, according to his claim; he thus did no more than bring to light, matters of public interest. The Court finding a violation of Jersild's freedom of expression by the Danish authorities, was of the view that punishing a journalist for contributing to matters of public interest including presenting statements by others which were racist as in the case, hindered the media from making such contribution.⁴⁸

The dividing line of determining 'intent' which would clarify what would or would not amount to hate speech in particular or an expression of racism in general, was offered in *Gunduz v Turkey*.⁴⁹ In that case a leader of a religious sect was invited onto a television programme where he faced questions and debates from the public. In the course of the programme he made a number of statements which were deemed to be 'hate speech' by the Turkish authorities. The Eur Ct H.R stated that whereas there was no doubt that concrete expressions of free speech which were insulting to certain individuals or groups were not protected by Art. 10 as was decided in the *Jersild case*, it must be shown that there was an intent to stir up

violence by adopting the insulting remarks, which given the contents and context of the programme, was not established in the instant case.⁵⁰

In respect of the sequence of aggravating behaviour in the *CBB* programme, aside from the admissions of guilt by Ms Goody in subsequent interviews on the damaging nature of her words to Ms Shetty, it is not conclusive that Ms Goody and the others also accused, acted as they did because they having preconceived same, *intended* racially motivated aggravation towards Ms Shetty. The choice of words used are an unpleasant indication of the manner in which persons manifest their anger with others of different racial distinctions in modern Britain; but a view of the reality nevertheless.

The same cannot be the same of the *BNP* case. There can be no doubt that the statement 'Let's show these ethnics the door' manifesting as a belief of a national party founded on principles of racial prejudice was intended to stir up the listeners to racial hatred of the group to which the statement referred. In addition, it cannot be expected that public persons do not have a greater responsibility to ensure that their statements or actions particularly in their public capacity do not incite others to hatred. Politicians in modern society have the greater task of social cohesion where they are part of a diverse community. The expression of a political manifesto which is in contrast with the underlying values of a democratic diverse society, does not pass the test of 'necessity' for a democratic society under Art.10(2) ECHR and ought to have been a cause for alarm and not merely accepted as a right to free speech given the context and content of the statements.⁵¹

The continuous regeneration of Human Rights discourses in both academic and non-academic circles revolve around these complexities of determining when certain

rights must give way for others in preserving stability in diversity. Coincidentally published after an article on racial relations in the UK which generated substantial debate⁵², the Government White Paper '*Fairness for All*', establishing the new Commission for Equality and Human Rights (CEHR), noted that 'the promotion of a wider culture of respect for human rights will also be important in developing strategies to promote good relations between different groups of people, building and encouraging cohesive communities'⁵³.

UK legislation includes a *Human Rights Act* (HRA)⁵⁴ which from its title appears to be a composite document on these fundamental rights⁵⁵. The Act includes those rights analogous to the fundamental rights of freedom of expression: the right to privacy; thought and conscience and; the freedom of expression.⁵⁶ These rights however have restrictions which would apply in the interest of national security, public morals and in the protection of the rights and freedoms of other persons.⁵⁷ As cited earlier in our discussion of the *CBB* incident, the *Crime and Disorder Act 1998* provides an instance of legal protection of the rights and freedom of others where it limits the freedom of expression granted under the Human Rights Act by making racially aggravated words and behaviour of private persons punishable under criminal law.⁵⁸

Media events like those which have formed the basis for our discourse reiterate an important feature of the Human Rights debates – the preservation of the inalienability of a human right to respect and dignity even under domestic law. Referring to the inalienable nature of certain human rights, Donnelly J (2007, p.284) states that in concept at least, they are 'the equal and inalienable entitlements of all individuals that may be exercised against the state and society' and 'are a distinctive way to seek to resolve social values such as justice and human flourishing'⁵⁹.

It is evident from the sensitive area of racial behaviour in private encounters that the human rights principles of respect and dignity for all persons which have evolved into race discrimination laws need to assume greater effectiveness if they are to achieve the law's mission of social control. But they can only do so if the individuals in society first appreciate that all human beings must be treated with equal dignity for no other reason than that they are human.

The question of when freedom of expression should be balanced against another's freedoms has also been considered in UK domestic courts. The cases of *Norwood v DPP* and *Hammond v DPP* are instructive. Generally, the courts have taken a cautious stance of limiting the freedom of expression where such expression is clearly offensive to the public⁶⁰. *Norwood v DPP* also involved the BNP. There, a BNP organiser was charged under S.5 of the *Public Order Act 1986*. He had placed in the front window of his home a poster containing the words, 'Islam out of Britain' and 'Protect the British people'. It was alleged that his conduct was motivated by hostility towards members of the Islamic faith. The District judge found that although the accused was free to express himself pursuant to Article 10 ECHR, he was restricted from doing so if it would constitute an offence to others. In his review of the case, Auld LJ (p.33) on appeal noted that the action of the BNP organiser 'could not, on any reasonable basis be dismissed as merely an intemperate criticism or protest against the tenets of the Muslim religion, as distinct from an unpleasant and insulting attack on its followers generally'.

Although the decision in *Hammond v DPP*⁶¹ is similar to that of *Norwood*, we do not find that they are exactly on all fours. Indeed the contrast between the two cases appears similar to our view of the contrast between the CBB and the BNP programmes respectively. In this case, a protester while preaching in a public place,

held up a sign with the words 'Stop Immorality'; 'Stop Homosexuality'; 'Stop Lesbianism'; 'Jesus is Lord'. He refused to leave the area in spite of attacks on his person by members of the public. He was charged under S.5 of the *Public Order Act*. At the Magistrates' court, he was convicted on the charge. On appeal at the Divisional Court, May LJ agreed that the appellant had a right to freely express himself under Art.10 ECHR and under Art.9 (freedom of religion). However, the judge was of the view that the freedom of expression in a democratic society such as the UK implied that tolerance must be shown to other persons.

Without departing from the scope of our considerations, we must lend our criticism of this decision to Geddis A (2004, p.866). The latter writes that to ask the accused

'to choose between presenting his belief in such a "non-insulting" fashion or not speaking at all – because of the "need to show tolerance towards all sections of society" – is to, in effect, tell him that society will not tolerate the public expression of his core beliefs'.

Balancing the propriety of personal conduct with the need to acknowledge that other persons in society are free to live their own lives the way they want irrespective of the peculiarities of their social group needs even greater caution than a resort to legislation. For how can tolerance mean 'not criticising' or 'not expressing disagreement with another's view'? Whether in public or private, the freedom of expression cannot be restricted by a blanket ban on not speaking at all. People must be free to say what they feel. They cannot however be encouraged to believe that they are better than others and so deserve greater political freedom.

We are aware that some may argue then that Christians such as in the *Hammond* case, ought not to say that others of a certain persuasion are destined for hell. Neither can any religious group threaten others with harm such as the recent terrorist

activity earlier referred to have undertaken. What is crucial is what is said, how it is said and the effect the statement has on the relations with members of a different group. A call to arms against a racial group cannot be equated with a remark that a certain person is a dirty fellow. Criticism of a person's views cannot be equated with an avowal to deport every one who holds that view.

There is no doubt that this is a difficult task for both the legislature and the courts. As Gellman S.& Lawrence F. (2004, p.437)⁶² argue, although the line between the two is not always easy to draw, thoughts and expressions may not be punished, but criminal intents and effects may. In our particular reflections, a statement borne out of feelings of hatred for a particular group manifesting an intention to deny that group or a member of that group the right to be left to go about his or her business must be limited. The question is how can it be done? How can the society proceed from nipping the harm at the initial stages?

2. Addressing interpersonal relations

Racial behaviour stems from personal bias and insensitivity, abstract ideals which the material machinery of legislative enforcement cannot sufficiently address without relying on the fundamental basis for justifying the citizen's right to legal protection from racially aggravated behaviour. The conclusions of the 1999 Macpherson Inquiry Report which followed after an inquiry into the Metropolitan Police's investigations of the murder of a black teenager Stephen Lawrence was emphatic on the need to protect persons from racially aggravated behaviour. In doing so, it warned as to the subtleties of racially aggravated behaviour and the need for the law to do more to prevent racist acts between private persons.

The Report stated that in general terms, "Racism" 'consists of conduct or words or practices which advantage or disadvantage people because of their colour, culture or ethnic origin. In its more subtle form it is as damaging as in its overt form.'⁶³ The Report also elaborated on what may be perceived as a racist incident suggesting that 'a racist incident is any incident which is perceived to be racist by the victim or any other person'⁶⁴.

The Macpherson Report analysed the differences between these subtle and overt forms of racially aggravated behaviour. It borrowed the term 'unwitting or unintentional racism' from an earlier report to Parliament by Lord Scarman into the Brixton Disorders in 1981⁶⁵. In the Brixton Disorders report, Lord Scarman had posited the view that while it would be wrong to adjudge the entire British society as racist; there was the possibility of an unwitting racist approach found in the discriminatory actions of either public or private persons in British society. A 1989 Home Office Report by the Racial Attacks Group appears to substantiate Lord Scarman's suggestion of unwitting racism:

To the extent that hostility, prejudice and fear remain as commonly felt attitudes in the majority population, there is a context in which a minority of that majority may feel tempted to translate their own more extreme versions of these attitudes into action in the form of racial attacks and harassment.⁶⁶

Lord Macpherson's view in the Stephen Lawrence inquiry was that unwitting racism result from a variety of factors including a lack of understanding; ignorance or mistaken beliefs; well intentioned but patronising words or actions and; unfamiliarity with the behaviour or cultural traditions of people or families from minority ethnic communities.⁶⁷ This perception underscores the view that 'it is not human diversity in general that is troublesome for a theory of human rights. The troubles are caused by a particular type of diversity: diversity of belief and value'⁶⁸.

To counter these problems, the Macpherson Report in one of its Recommendations⁶⁹ suggested amendment of the National Curriculum to include educating the public through initiatives aimed at valuing cultural diversity and which would assist the prevention of racism⁷⁰. This recommendation was stated as follows:

... in creating strategies under the provisions of the Crime & Disorder Act or otherwise Police Services, local Government and relevant agencies should specifically consider implementing community and local initiatives aimed at promoting cultural diversity and addressing racism and the need for focused, consistent support for such initiatives.⁷¹

Another recommendation was for the application of race legislation to private exchanges between persons. The Report suggested that '...consideration should be given to amendment of the law to allow prosecution of offences involving racist language or behaviour, ... where such conduct can be proved to have taken place otherwise than in a public place'⁷². In essence, the Report sought to extend the scope of race legislation not only to private persons but also to make private expressions of racially aggravating behaviour even where these were not done in public, punishable under the criminal law.

For the law to be an effective means to control racially aggravated behaviour in private encounters, there is need to ground the legislation in the fundamental *raison d'etre* for determining that a person must be free from racially aggravated attacks. Incorporating human rights principles into the legal framework of a country is not enough. The public have to be educated on the rationale for their adoption. To provide for criminal punishment as a means of protecting persons from racial discrimination will not suffice on the long run to avert the occasions of threatening

behaviour and its often unfortunate results. Furthermore, these categories of legislation may not actually be able to fulfil any real purpose so long as they cannot justify curtailing the parallel fundamental right of every individual to express themselves without providing a cogent reason for doing so. In our view, this justification is first met by increased social awareness on the right of every person to be treated with respect and dignity.

The inclusion of the right to be treated with respect and dignity in legal provisions implies that the law recognises that persons cannot be abused or insulted; their cultures mocked and their values attacked. Bullying, discriminatory behaviour and segregation flourish in an atmosphere of denial of the intrinsic equal status of every human person particularly when the law does not protect and, the domestic legal machinery cannot preserve, the inalienability of these rights. For modern multicultural society to have a more positive view of racial distinctions; a view 'which recognises a positive value in diversity, a meaningful acceptance of other cultures and respect for their values, traditions and deep moral differences,'⁷³ that society must have a thorough understanding of the inalienable nature of the human right to dignity.

The EU Directive 2000/43⁷⁴ which sets out the legal framework for the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin in the EU, provides that 'an unwanted conduct related to racial or ethnic origin' which has the 'purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment' amounts to discriminatory behaviour for the purposes of the Directive.⁷⁵ However, although the scope of the Directive makes it applicable to 'all persons, as regards both the public and private sectors, including public bodies'⁷⁶ its provisions are more applicable to the public spectrum.⁷⁷

On the other hand, the UK *HRA* which incorporates the *European Convention on Human Rights (ECHR)*⁷⁸ alludes to social, economic and political rights and freedoms but with very little mention of the basis of the human rights concept or of the right of a person to be treated with dignity. Article 3 of the *HRA* on 'Prohibition of Torture' is the nearest the Legislation makes to an admission that individuals have a right to be free from abuse. It states that 'no one shall be subjected to torture or inhuman or degrading treatment or punishment.'

The absence of a reference to the right of every individual person to be considered equal and to be treated with dignity in the UK *Human Rights Act* and which as is expected, is not covered by race discrimination legislation such as the *Race Relations Act 1976 (as amended 2000)* or criminal legislation on race discrimination such as the *Public Order Act 1984* and the *Criminal Justice and Public Order Act 1994*, make it highly improbable that anything more than moral opprobrium can be extended for the type of racist bullying that went on in the private CBB dwelling. The efficacy of these legislation are already seen in the acquittal in the Nick Griffin (and the BNP) case. Thus, the everyday incidences of derogations from this fundamental human right amongst private persons⁷⁹ and which are the bedrock of racial tension in any multicultural society cannot be effectively tackled by relevant UK legislation.

Domestic recognition in law of the right to dignity affords the judiciary a composite framework on which to determine whether the purpose of race legislation and the parallel criminal provisions have been contravened in the event of a case hinging on an accusation of racially aggravated offences in the private realm. The judicial duty of interpreting the law in human rights matters as they relate to individual rights to freedom of expression will be enhanced where the courts have the interpretative

mandate of determining whether words or actions not only appear to be racially motivated, but also amount to attacks on dignity. In the Nick Griffin decision therefore, the judge bearing in mind that the law seeks ultimately to protect the dignity and respect due to every individual may have offered a different view on the limits to free speech, to the effect that words or behaviour which people find “unacceptable, unpalatable and sensitive” when they are used in a racially discriminatory context, are indeed ‘unacceptable’ and amount to an abuse of the right of others to their dignity and therefore will not be tolerated by law.

3. Education and Protection from racially aggravating conduct

What is needed is for a more robust and positive response to satisfy the needs of a multi-ethnic and socially diverse population and, to address the constant flux in the state of race relations which issues of increased restrictions in immigration and asylum policies; overburdening of housing and social benefits schemes; media portrayal of cultural diversity arouse as the national demography is altered.

The problem is not that the laws do not recognise the need to ensure that people feel safe and secure in the UK. The problem is what the CBB 2007 and Channel Four have highlighted, albeit unwittingly. It is that in the realm of private relations, the law may not prove an adequate guarantee that people can go about their daily lives confident that their right to be treated with respect and dignity is protected where the legal framework and cultural policy do not support these principles. However, the law can provide the impetus for the important non-legal means by which race relations between private persons can be improved.

In our view, criminal punishment for racially aggravated behaviour does not address the underlying causes of the misconceptions and prejudices which give rise to racist

behaviour. Borrowing from the Macpherson recommendation for a review of the National Curricula, a primary reorientation of the classroom curricula towards a “knowledge of the culture, history, language and religion of ... national minorities and majorities”⁸⁰ as suggested in the United Nations Convention on the Rights of the Child (UNCRC) and echoed in the Council of Europe’s Framework for the Protection of Local Minorities (FCPNM), is necessary. The value of a well rounded and sound class room education to inform the public particularly the young on the heritage and cultures of other persons cannot be underestimated.

In terms of national curricula properly speaking, programmes and policies aimed at celebrating (*not establishing*) cultural diversity are more beneficial than hospitality-style gestures which do more to obstruct than entrench cohesion of different ethnic groupings. Such subtle aids to discrimination include the lack of well structured integration policies for immigrants and asylum seekers such as the offering of free translation options to non-native speakers rather than an emphasis on learning the language; the slow but steady transformation of neighbourhoods into racial neighbourhoods with the provision of housing facilities to a particular group in certain locations; media publicity to inflammatory speech and race motivated incidents which do not condemn the acts but merely represent them for publicity sake.

It could be argued that none of the above is within the immediate interests of national governments and domestic policy making faced with a rapidly expanding diverse population to address. It could also be argued that allowing for immigrants to feel welcome in a society by not restricting their ability to communicate in their language or to maintain their fraternal connections is conducive to their integration and could be seen as part of a policy towards what is referred to as ‘affirmative action’ in the United States.⁸¹ However, isolation of immigrants from the native population be it by

a national policy of segregation or by the adoption of populist (whether of immigrants' or natives') ideas that every racial and cultural expression must be preserved at all costs neither fulfils this right to dignity nor, reflects favourably on integration and on social cohesion of a multicultural society in general⁸².

Given its freedom to provide information and entertainment to the public, there is also some measure of action needed by the media⁸³. Broadcasts of cultural programmes presenting the beliefs or values of the different races in society assist towards a factual representation of suspected areas of differences. Some caution is needed in such representations - patronising, distorted and badly researched programmes on culture and lifestyle of a group can exacerbate racial tensions. The NGO representatives at the 7th European Ministerial Conference on Mass Media Policy emphasised this duty on the media:

The role of public service broadcasting is especially important in providing diverse content for all segments of the society. At the same time there is an important task in front of public service broadcasting and other general or mainstream media, namely to contribute to integration and social cohesion taking into account increasing multicultural character of European societies. When we are mentioning need for media contribution to social cohesion and integration we have in mind negative effects of the fragmentation of the audiences, insufficient access to the media for minorities and misrepresentations of minorities in the media.⁸⁴

Some may argue that the right to respect and dignity is vague and imprecise and will add nothing to the general understanding of individual liberties. We do not share this view. Respect and dignity may be moral issues but they are more importantly ideals which every individual in a free society exercises claim over. The right to be treated with respect and dignity immediately determines that racially aggravating words and

behaviour are a fundamental disrespect of the intrinsic and inalienable freedom of all human beings; and a right which the State does well to maintain for the peaceful co-existence of its citizenry.

4. Conclusion

In the diverse communities of modern society, racially aggravating behaviour is a real threat to the peaceable co-existence much needed across a multicultural terrain. Racism resonates with fundamental misapplication of values expressed in violent reaction to real or imagined threats. Often borne out of prejudices fostered by an ignorance about other peoples' history and culture, racist behaviour is misguidedly adopted as an [in]effective means of establishing a person's refusal to be treated without the 'respect' that person presumes he or she deserves. The ensuing response of racist thinking is very clearly an attack on the dignity of other persons; and a lack of respect for the intrinsic humanity of that other person.

Domestic race legislation attempts to combat these shortcomings by extending the frontiers of international legislation to directly apply in the national setting. Apart from the obvious aim of compliance with international human rights standards, domestic race legislation in addition to its central role of social control, publicly condemns and provides punishment for racist behaviour to other persons in society. It could also be assumed that these laws also seek to act as a deterrence to persons and institutions in society.

The lessons from *Celebrity Big Brother (UK) 2007* and *The Secret Agent* television programmes primarily inform of the current state of race discriminatory in the private spectrum. They also emphasise the limitations of UK race legislation in addressing racially aggravating behaviour when this occurs between persons. Most legal

protection covers acts done in public or incidences arising in public institutions. Even so, criminal punishment while reprimanding offenders be they public offenders, institutions or their officers, does not address the wider underlying causal factors of racially motivated crimes – the lack of respect for human dignity.

Aside from alluding to international covenants guaranteeing human rights, the domestic realm needs to adopt the further roles of education and prevention to give further reach to its central role of social control. In the UK, this will require in the first instance, legal recognition of the *rationale* in international covenants' provisions which propose "the right of every person to be treated with respect and dignity". Rather than arising by way of a subsequent counter-attack to racist behaviour as consecutive UK race legislation have become, including this fundamental principle of human rights in a human rights legal framework such as the UK *HRA* ensures that the law fulfils its principal objective of protecting human freedom and, anticipates racial action. By this means also, the law is equipped with the capacity to punish even private offenders be they in public or private places.

In addition, the application of legislative force to the necessary 'non-legal' means of tackling and averting racist behaviour through expanding national curricula on *inclusive diversity* education is also required of the legislative process. By inclusive diversity education, we refer to those learning modes characterised by an examination of the common human values and their expressions across the racial divide. Furthermore, local community activities and public awareness strategies, including action by the media which respect cultural differences and emphasise our collective humanity, will prove more beneficial than those which 'celebrate' the differences in multicultural society.

The real lessons from Television is for the modern world as it settles into the 21st century to reconnect with the rationale for the human rights ideals – the inviolable dignity of the human person. As yet, it proves less arduous for the law to compel institutional compliance with human rights anti-discriminatory provisions than to regulate the action of individuals in their private encounters. Yet, the often disastrous consequences of race tensions in the private spectrum revive the urgency for legislative action in containing the every day racially aggravating behaviour which mars peaceful co-existence.

¹ Dan Kahan, 'Two Liberal Fallacies in the Hate Crimes Debate' *Law and Philosophy* 20 (2001) pp175-193 at 175.

² See for instance, Heidi M. Hurd, 'Why Liberals should Hate "Hate Crime Legislation"', *Law and Philosophy* 20 (2001) pp215 – 232; Anthony M. Dillof, 'Putting Hate in its Place: The Codification of Bias Crime Laws in a Modern Penal Code' *Buffalo Criminal Law Review* 4 (2000) pp341-397, Maleiha Malik, "'Racist Crime": Racially Aggravated Offences in the Crime and Disorder Act 1998 Part 11, *62 Modern Law Review* (1999) pp 409-424.

³ The eviction of one of the housemates involved, Ms Jade Goody on Friday of Week 3 of the programme, was the highest rated evicted show in CBB history. 8.8m viewers tuned in to see her eviction and interview. See The Celebrity Big Brother viewing figures: [<http://thediaryroom.net/tbbs/index.php?page=ratings>] visited 14.03.07.

⁴ This term was employed by the media in various accounts of the events in the Big Brother House.

⁵ Ms Shilpa Shetty, a Bollywood actress.

⁶ Ms Jade Goody.

⁷ See <http://www.channel4.com/news/special-reports/special-reports-storypage.jsp?id=4401> visited 26 January 2007.

⁸ Ibid.

⁹ Ibid.

¹⁰ The abuse incidences are detailed by Channel Four, the programme's broadcaster on its online news page:

<http://www.channel4.com/news/special-reports/special-reports-storypage.jsp?id=4401>

See 'Big Brother Q & A: The Main Points of the Big Brother Racism Row' 18 January 2007; visited 25 January 2007.

¹¹ See *News of the World* Sunday 21 January 2007 pp2 – 5 in an interview with Ms Jade Goody about her actions in the BB House.

¹² See the opinion of Trevor Philips, Chairman of the Commission for Equality and Human Rights, 'Crocodile Tears Won't Wash Her Guilt Away' *News of the World* above; p 4; See also the comment of Priyamvada Gopal, 'Anti-racism has to go beyond a facile representation game' *The Guardian* Thursday 25 January 2007.

¹³ See for instance the reports of the expulsion of the founder and his views on the Party at: <http://politics.guardian.co.uk/farright/story/0,11375,1028498,00.html> visited 06.08.07; See also, 'BNP: Under the Skin' wherein an erstwhile deputy leader declared the party to be 'racist' and, the 1990 European Parliament's Committee on Racism and Xenophobia opinion

that the Party was “an openly Nazi Party ...whose leadership have serious criminal convictions” online at:

http://news.bbc.co.uk/hi/english/static/in_depth/programmes/2001/bnp_special/roots/1984.stm;
visited 06.08.07

¹⁴ See the BNP policies web page at the organisation’s web site: www.bnp.org.uk visited
06.08.07

¹⁵ Ibid.

¹⁶ See the BBC web page <http://news.bbc.co.uk/1/hi/england/bradford/6135060.stm> for a link
to the secret filming; visited 06.08.07.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See Anti-Discrimination board of New South Wales, Australia; *Race for the Headlines (Racism and Media Discourse)* Executive Summary, p.2; Online at
[http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_raceheadlinesreport] visited
11.07.07.

²⁰ Ibid.

²¹ See Solomos J & Back L, *Racism and Society* Macmillan (1996) p.19.

²² Home Office UK: *The Perpetrators of Racial Harassment and Racial Violence*; Research
Study 176 (1997), p.14

²³ See the Home Office Study *op cit*, p.5 citing that newspapers and television reports provide
a very public source of information on racist attacks, usually giving the names of the victims.
The names of those responsible for such serious incidences are less well known for many
reasons including that the perpetrators have not been identified; or charged; or are awaiting
trial; or where there is no evidence of racial motivation presented in the court and thus the
incident is not known as a “racist attack”.

²⁴ See S. 2 Ofcom Broadcasting Code, 25 July 2005.

²⁵ See the BBC Royal Charter 1996 [1 Jan 2007] S.3 (1) & (2).

²⁶ Ibid. See Ss.4; 5.

²⁷ Note that unlike Channel 4, the BBC was not accused of this offence pursuant to S.22
Public Order Act 1986. Perhaps this was because the BBC programme was presented as a
factual documentary on a UK party whereas the *CBB* affair was internationally wounding to
Britain’s reputation as a ‘tolerant’ society.

²⁸ The relevant provisions of the Act quoted are for England and Wales.

²⁹ See Donald Saucier, Jericho Hockett & Andrew Wallenberg, ‘The Impact of Racial Slurs
and Racism on the Perception and Punishment of Violent Crime’; *Journal of Interpersonal
Violence* 23:5 (2008) pp685-701 at 685.

³⁰ *Op cit*, p.223.

³¹ Ibid.

³² This is a defence which Ms Goody has constantly relied upon in her apologies and
interviews after her departure from the programme. She has stated variously: “That is the only
way I know how to argue; I am embarrassed but that is the way I know how to argue” See her
interview with *News of the World* Sunday 21 January 2007 pp2-5 at 2.

³³ See S.154, the *Criminal Justice and Public Order Act 1994*. S.154 in an Amendment to the
1986 Public Order Act, Ss 4;5.

³⁴ Ibid.

³⁵ Italics for emphasis.

³⁶ See reports of the case at:

http://news.bbc.co.uk/2/hi/uk_news/england/bradford/6133754.stm visited 06.08.07.

³⁷ See the Schedule to the Racial and Religious Hatred Act 2006. The Act amends the Public
Order Act 1986 by the inclusion of offences for stirring up racial and religious hatred in Part III
and; the Criminal Evidence Act by limiting the power of citizens’ arrest for the new offences –
See *Explanatory Notes to Racial and Religious Hatred Act: Chapter 1 2006* Crown Stationery
Office (2006). The Act is expected to come into force in 2007. The *Anti-Terrorism Crime and
Security Act* (2003) also provides that racially aggravating behaviour on the basis of religion
constitute an offence. See Part 5 of the Act.

³⁸ In February 2006, the government sought an amendment of the Act. The House of Lords
had approved the Bill proposing the legislation on Racial and Religious Hatred with the
insistence that abusive and insulting behaviour should not be criminalised and that people

should not be punished for recklessly stirring up (without intent) religious hatred. The Government's proposal for an amendment was defeated by a lone vote majority of 283:282.

³⁹ The sacking of Tory Shadow Homeland Security Minister Col Patrick Mercer, by the Conservative Party in March 2007 for offering his private view of military life and the supposedly intrinsic discriminatory (including racially aggravated) behaviour in an interview, refers here. See the interview and subsequent action by his party online:

[<http://www.timesonline.co.uk/tol/news/politics/article1484909.ece>] visited 14.03.07.

⁴⁰ Freedom of Expression is provided for in virtually every international legal instrument that pertains to human rights. These include: Art.10 European Convention on Human Rights (ECHR) 1950; Art. 19 International Covenant on Civil and Political Rights (ICCPR) 1966; Art. 19 Universal Declaration of Human Rights (UDHR) 1948; Art.13 American Convention on Human Rights 1969; All these instruments however provide for circumstances which may justify a restriction to the exercise of this right.

⁴¹ The term 'Hate speech' has been adopted by both domestic and international jurisdictions. It refers generally to expressions which are adopted against a person, or group based on their membership of a particular group, race, belief, etc; an expression of racism, or other forms of intolerance and discrimination. Some legal instruments on hate speech/crime include: Committee of Ministers of the Council of Europe *Recommendation No. R (97) 20* of 30 Oct 1997; Council of Europe *European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 7* of 13 Dec 2002; US Public Law No 103-322, 1994; S.312 Canadian Criminal Code 1985; Ss. 16 (c) ; 36 South African Constitution 1994; S.61/131 New Zealand Human Rights Act 1993; Victoria, Australia; Racial and Religious Tolerance Act 2002; Arts 4; 5, Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965.

⁴² The Canadian Supreme Court in *Rv Keegstra* [1990] 3 S.C.R. 697, acknowledged that there was a difficulty in deciding a balance between what was acceptable and what was not as hate speech, but in upholding hate speech laws as constitutional, stressed the 'potentially catastrophic effects of the promotion of hatred'.

⁴³ See the case studies in the Home Office study on perpetrators of racial harassment, *op cit*.

⁴⁴ *Handyside v United Kingdom* ECHR, Judgement of 7 Dec 1976; Series A, No.24 737.

⁴⁵ *Ibid*, para 52.

⁴⁶ Judgement of 23 Sep 1994, Series A No. 298; 19 EHRR 1 (1995).

⁴⁷ *Ibid*, at p.28

⁴⁸ *Ibid*. See also *Cumpana & Mazare v Romania* Applcn No. 33348/96; ECtHR 2004 – XI; 17 Dec 2004; where the Grand Chamber reiterated that a journalist's freedom of expression included the freedom to present matters of interest to the public and may not be derogated from except in extreme circumstances which would include the use of hate speech or the intention to stir up violence.

⁴⁹ Application No 35071/97; ECHR 2003 – XI; 4 December 2003

⁵⁰ See the case generally; See para 22.

⁵¹ See particularly the dissenting judgements in *Lehideux and Isorni v France* Judgement of 27 Sep 1998, Reports of Judgements and Decisions 1998 – VII where the minority judges were of the view that national authorities were not in violation of Art.10 where they had a greater margin of appreciation to consider whether the expression (press publication) of a pro-Nazi policy, in modern France could be afforded the protection of Art.10. -; See also *Zana v Turkey* Judgement of 25 Nov 1997, Reports of Judgements and Decisions 1997 – VII at paras 57 – 62.

⁵² See D. Goodhart, 'Discomfort of Strangers' *The Guardian* Tuesday, February 24, 2004 and the responses; available online [www.guardian.co.uk/britain/goodhart] visited 1.08.07. The article explored the diverse landscape of modern Britain and the consequences of increased migration on the political and economic landscape of the country.

⁵³ UK Government White Paper, *Fairness for All: A New Commission for Equality and Human Rights*, (DTI in association with the Department for Constitutional Affairs, Department for Education and Skills, Department for Work and Pensions, and the Home Office), Cm.6185 (May 2004) para 1.11.

The White Paper stopped short of clearly establishing the powers of the CEHR in respect of individual encounters of racism restating the government's focus on preventing race discrimination in 'institutions' as opposed to private persons by restating the duty of compliance with discrimination legislation and the HRA on employers and service providers in the private and voluntary sector, as with public sector bodies. See the White Paper at para

7.37-8. See also, F Klug and C O'Brien, "Fairness for All?" *An Analysis of Human Rights Powers in the White Paper on the Proposed Commission for Equality and Human Rights*; Online at: [www.lse.ac.uk/Depts/human-rights/Documents/Fairness_for_all.pdf] visited 1.08.07.

⁵⁴ See the Preamble of the Act. The UKHR is made pursuant to the ECHR which in its preambles recognise the fundamental rights and freedoms of the UDHR and seeks to realise the peace and security promised by the universal observance of the provisions of the UDHR.

⁵⁵ We discuss more on the Act's limitations subsequently.

⁵⁶ See Articles 8; 9; 10 of the Human Rights Act (1998).

⁵⁷ Each of the Articles above restate these and other limitations in their sub paragraphs. See Articles 8(2); 9(2); 10(2).

⁵⁸ See generally Ss 29-32 Crime and Disorder Act 1998.

⁵⁹ Donnelly J; 'The Relative Universality of Human Rights' *Human Rights Quarterly* Vol 29 No 2 (May 2007) John Hopkins University Press, pp 281-306 at 284.

⁶⁰ See for instance, *R (on the application of Pro-Life Alliance) v BBC* [2004] AC, 185.

⁶¹ [2004] EWHC, 69.

⁶² Gellman S and Lawrence F, 'Agreeing to Agree: A proponent and Opponent of HATE Crime Laws Reach for Common Ground, *Havard Journal on Legislation* (2004) 41:3 pp421 – 448.

⁶³ See the Macpherson Report at para 46.25.

⁶⁴ See Chapter Forty Seven of the Report, para 12.

⁶⁵ *Ibid*, See particularly, para 6.7 – 6.10

⁶⁶ See the Home Office Report *op cit*, p.11.

⁶⁷ *Ibid*, para 6.17

⁶⁸ Jones; 'Human Rights and Diverse Cultures: Continuity or Discontinuity?' – Casey & Jones (eds) *Human Rights and Global Diversity* London Cass (2001); pp 27-8

⁶⁹ Other recommendations include the strengthening of the *Race Relations Act*, which has already been done by extending the provisions of the Act to cover public authorities and bodies. *The Race Relations Act 1976 (as amended 2000)* provides for instances of racial discrimination or segregation (See S.1) and addresses these circumstances in certain fields of human interaction e.g Employment (Part II); Education (Part III); Public Authorities (S.19B). Cf, Henrietta Hill, *The Blackstone's Guide to the Race Relations (Amendment) Act 2000* Oxford University Press (2001).

⁷⁰ Cf, The Macpherson Report, Chapter Forty Seven para 68.

⁷¹ *Ibid*, para 70.

⁷² See the Macpherson Report, Chapter Forty-Seven, para 39.

⁷³ D. McGoldrick, 'Multiculturalism and its Discontents' *Human Rights Law Review* Vol 5 No 1, pp27-56 at 31.

⁷⁴ Of 29 June 2000.

⁷⁵ *Ibid*; Article 1; 3.

⁷⁶ *Ibid*; Article 3.

⁷⁷ *Ibid*; See generally Article 3:1 (a-h).

⁷⁸ See the European Convention on Human Rights and its Five Protocols (1950). Both the UKHR and the ECHR can be contrasted with the UDHR. In its Articles 1 and 2, the latter provides that all humans are equal in dignity and rights and; everyone is entitled to the rights and freedoms of the Declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷⁹ These include but are not limited to: snide mimicry of accents; making of animal noises; abuses; segregation and isolation of other persons; etc. We must emphasise that this treatment is meted out across the racial divide. That the victim in the programme here was of Indian origin is merely circumstantial. It is also irrelevant the class or section of UK society to which the accused persons belonged

⁸⁰ See Art 29 UNCRC; Art 12 FCPNM. See also, E. Craig, 'Accommodation of Diversity in Education - Human Rights Agenda', *Child and Family Law Quarterly* Vol 15 (2003) pp279 – 294 where she points out that recognising cultural diversity is more a matter of necessity and thus 'it is presumptuous to speak of a human rights agenda with regard to the accommodation of diversity in education'; at p.294.

⁸¹ Affirmative action refers to the grant of certain preferential treatment to minority groups who are presumed to be less-advantaged in aspects such as education, housing, employment.

⁸² Here, we mean that respect for the rights to dignity does not mean a violation of the rights of others or the imposition of private and cultural beliefs on other persons or on the community. See the Human Rights Committee interpretation of the ICCPR General Comment 31; *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, of 20 May 2004: 'a failure to comply with the obligation to give effect to the Covenant Rights cannot be justified by reference to cultural consideration; in particular, the rights of members of minority groups to enjoy their own culture under Article 27 ICCPR cannot be used as justification or violating the rights of others'; 11 IHRR 905 (2004), at para 14. See the following cases wherein the courts stressed these limits to personal rights in a multicultural society: *Leyla Slim v Turkey Application* ECtHR Application No 44774/98, Judgement of 10 November 2005; See also *R (on the application of Begum) v Head Teacher and Governors of Denbigh High School* [2006] UKHL 15; 22 March 2006; *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, paras 15-19, decision of the South African Constitutional Court in *Christian Education South Africa v Minister of Education* [2001] 1 LRC 441, para 36.

⁸³ This extends to all forms of media, including the online media which because it remains largely unregulated is more able to stir racial hatred by spreading political and discriminatory messages. Many terrorist groups utilise the web which lacking geographical frontiers is an [in]appropriate means of reaching the widest public. For a general discourse on the media and 'online' freedom, See Jacob Rowbottom, 'Media Freedom and Political Debate in the Digital Era', *The Modern Law Review* (2006) Vol 96 No 4, pp489-513 at 491-7; See also the *Joint Statement on Racism and the Media* (UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression) 1 March 2001 (Office of the UN High Commissioner for Human Rights)

⁸⁴ 'Cultural Diversity and Media Pluralism in Times of Diversity'; 10-11 March 2005 available at: http://www.eumap.org/advocacy/advoc_eumap/media/mmpcouncil7/cdamp visited 06.08.07.