

Democracy, Free Speech and TV: the case of the BBC and the ProLife Alliance

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Summary

Freedom of political expression generally receives a very high degree of protection from the courts. Political expression in the UK's broadcast media, by comparison, receives far lower levels of protection. This has been graphically demonstrated recently by the decision of the House of Lords in *R (on the application of the ProLife Alliance) v BBC* in which a majority of their Lordships upheld a refusal by the BBC and independent broadcasters to transmit a Party Election Broadcast by the ProLife Alliance, depicting an abortion, prior to the 2001 general election. It will be argued that this decision is inconsistent with the jurisprudence underlying the free speech right and with the Article 10 case law of the European Court of Human Rights. In particular it will be argued that the court failed to have due regard to the type of

expression at issue in the case resulting in an inadequate assessment of the proportionality of the restriction.

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1. Introduction

On April 20th 2004, for the first time on terrestrial British television, graphic footage of an abortion was broadcast in the Channel 4 documentary *My Foetus* (see *The Guardian* 20 April 2004; 21 April 2004). Three years previously similar footage was submitted by the ProLife Alliance to terrestrial broadcasters to be transmitted in the form of a Party Election Broadcast in the run up to the 2001 General Election. The broadcasters refused to transmit it on the grounds of taste and decency and this refusal was upheld by the House of Lords in *R (on the application of ProLife Alliance) v BBC* ([2003\] UKHL 23](#); [2003] 1 AC 185).

Freedom of political expression generally receives a very high degree of protection from the law. This is in large part due to its central role in maintaining effective political democracy. However, when it comes to what is arguably the most powerful and effective medium of all, broadcasting, political speech is accorded lower levels of protection than its alleged importance would seem to warrant. This apparent paradox has been highlighted and accentuated recently by the decision in the *ProLife* case.

The opportunities for political parties or politically motivated groups in the UK to use the broadcast media to communicate directly with the public are very limited. Broadcast advertising - paying for airtime - for political purposes is prohibited by s 321 of the Communications Act 2003 which retains the former prohibition under s 8 and s 92 of the Broadcasting Act 1990. The only way that a political party can use the broadcast media to communicate its message directly to the electorate is through the Party Political Broadcast (PPB).⁽¹⁾

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2.The ProLife Alliance Party Election Broadcast 2001

The ProLife Alliance is a political party registered under the Parties, Elections and Referendums Act 2000. It campaigns on a platform of 'absolute respect for innocent human life from the one-cell embryo stage until natural death'. One of its primary aims is the prohibition of abortion (see <http://www.prolife.org.uk/about/manifesto.htm>). At the 2001 General Election the Alliance put up enough candidates in Wales to entitle it to a single Party Election Broadcast (PEB) of up to four minutes and 40 seconds to be screened only in Wales on all terrestrial channels.⁽²⁾

ProLife supplied the BBC with a video to be transmitted as its PEB. It consisted mainly of 'prolonged and deeply disturbing images' of aborted fetuses: 'tiny limbs, bloodied and dismembered, a separated head, their human shape and form plainly recognizable' (*R (on the application of ProLife Alliance) v BBC* [2002] EWCA Civ 297; [2002] 3 WLR 1080 *per* Laws LJ para 13 whose description was adopted by the House of Lords).

Section 6(1)a of the Broadcasting Act 1990 imposed on the Independent Television Commission (ITC) a duty to do all it could to ensure that every service which it licensed complied with the requirement that 'nothing is included in its programmes which offends against good taste and decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling'.⁽³⁾ The BBC operates under a Royal Charter (Cmnd. 3248, 1 May 1996) but faces very similar obligations under its governing Agreement.⁽⁴⁾

Representatives of the BBC and independent broadcasters viewed ProLife's tape and concluded that the footage would not comply with the 'taste and decency' standards. In a letter dated 17th May 2001, containing the views of all the broadcasters, the BBC informed ProLife that:

some of the images are unacceptable in themselves because they are likely to be offensive to public feeling, in particular the images of aborted fetuses mostly in a 'mangled and mutilated state'. . . Some images . . . could in principle be acceptable depending on the context . . . What is unacceptable . . . is the cumulative effect of several minutes primarily devoted to such images . . . None of the broadcasters regarded this as a case at the margin. (quoted by Lord Hoffmann at para 44)

ProLife offered the concession that the PEB be broadcast after 10 pm, with a warning for viewers, but the broadcasters judged that the images were 'so offensive that it would not be appropriate to take that course in this case'. ProLife responded by submitting two toned down versions of the video, neither of which was acceptable on the grounds of taste and decency. Eventually a fourth version, with a blank screen with only the word 'CENSORED' and a voice over was transmitted on 2 June 2001. In the election on the 7 June the six ProLife candidates in Wales received a total of 1609 votes, or 0.117% of the votes cast in the principality (Geddis 2002, p 618).

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3. The ProLife litigation

ProLife applied for judicial review of the broadcaster's refusal (*R (on the application of the ProLife Alliance) v BBC* [2001] EWHC Admin 607). Permission was refused on 24 May 2001. ProLife's appeal was upheld (*R (on the application of the ProLife Alliance) v BBC* ([2002] EWCA Civ 297; [2002] 3 WLR 1080) although only after the 2001 General Election had taken place (for comment see Geddis 2002). The Court of Appeal held that both the common law and Article 10 of the European Convention of Human Rights placed the very highest importance on freedom of speech at election time and whilst there may be instances, even at election time, when political speech may be justifiably censored on grounds of taste and offensiveness, it would take a 'very extreme case'.⁽⁶⁾

A majority of the House of Lords upheld the broadcaster's appeal.⁽⁶⁾ The majority identified two separate and distinct questions arising in the case. Firstly whether PEBs were subject to standards of taste and decency at all; and secondly, if they were, whether the broadcasters had properly applied those standards (see Lord Nicholls at para 9, Lord Hoffmann at para 49 and Lord Walker at para 125). In their judgment only the second of these questions was properly before the court, because ProLife had conceded that the offensive material restriction was not in itself necessarily an infringement of Article 10 (Lord Nicholls at para 10). A majority of their Lordships found that the Court of Appeal had fallen into error by failing to distinguish these two questions and had wrongly considered the first – whether the standards of taste and decency applied to PEBs at all. It had carried out its own balancing exercise between the requirements of freedom of political speech and the protection of the public from being unduly distressed in their own homes. That was not a legitimate exercise for the courts in this case. Parliament had decided where the balance should be held and had decreed that the offensive material ban applied without distinction to all television programmes, including party broadcasts. In the absence of a successful claim that the offensive material restriction was not compatible with the Convention rights of the ProLife Alliance, it was not for the courts to find that the broadcasters acted unlawfully when they did no more than give effect to their legal obligations (Lord Nicholls at para 16). Indeed they should be accorded a degree of deference due to their expertise and the fact that they carried out audience research and were in touch with the expectations of their likely audience (Lord Hoffmann at para 80).

It will be argued below that the House of Lord's decision undervalues the importance of freedom of political expression in a way which runs counter to the philosophy which underpins the free speech right and the clear jurisprudence of the European Convention on Human Rights (ECHR). To this end the philosophical underpinnings of the free speech right and the ECHR jurisprudence will briefly be summarized. Thereafter the House of Lord's decision will be critiqued.

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4. Freedom of expression: the philosophical underpinnings

Various arguments have been advanced justifying the existence of a right to freedom of expression over the last 150 years. Foremost amongst these have been the arguments from truth, self-fulfilment and democracy (see Schauer 1980; Barendt 1985, ch 1). The argument from truth is famously associated with John Stuart Mill's *On Liberty* of 1859. Mill argued that the pursuit of truth was of overriding importance for the development of society and the best way to arrive at the truth is to allow freedom of discussion and debate (see Mill 1980; Schauer 1980, ch 2; Barendt 1985, pp 10-14).⁽⁷⁾

The argument from self-fulfilment asserts that freedom both to impart and receive ideas and arguments is a vital part of each individual's right to self-development and fulfilment. People will only be able to maximise their potential as human beings if they are free to express and have expressed to them, ideas, beliefs and arguments (Schauer 1980 ch 4; Barendt 1985 pp 14 – 20; Scanlon 1977).⁽⁸⁾

Perhaps the most accessible and powerful argument is that from democracy. In its historical origins it is particularly associated with Alexander Meiklejohn. (Meiklejohn 1961;1965) He argued that in order for citizens in a democracy to be able effectively to exercise their democratic responsibilities they must have free access to information and arguments about politicians and their policies. Furthermore it is only the freedom to criticise government that makes it effectively accountable to the electorate.

It is the argument from democracy that has found most favour in the courts in the USA under the First Amendment (see for example *New York Times v Sullivan* 376 US 254 (1964)), in the case law of the ECHR and in the UK (see for example *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534). Lord Steyn in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 at p 126 put it thus:

Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

Thus one of the main justifications for a strong free speech right is that it is seen as a *sine qua non* of democratic society.

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5. Article 10 ECHR – The Right to Freedom of Expression

Article 10 of the ECHR protects freedom of expression. The European Court has repeatedly stressed its importance. For example in *Handyside v UK* (1979-80) 1 EHRR 737 para 49 it stated:

Freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man.

Thus the justifications for strong protection of freedom of expression stressed by the Strasbourg jurisprudence centre on its role in the protection and fostering of democracy and in its role as a necessary prerequisite of individual self-fulfilment.

It is clear from the case law of the European Court that the degree of protection afforded will very much depend on the subject matter of the expression at issue. There is an apparent hierarchy or gradation of expression, with political or journalistic expression involving the public interest at the top (see for example *Lingens v Austria* (1986) 8 EHRR 103; *Castells v Spain* (1992) 14 EHRR 445; *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843), artistic expression somewhere below this (see for example *Muller v Switzerland* (1991) 13 EHRR 212; *Otto-Preminger-Institute v Austria* (1995) 19 EHRR 34; *Wingrove v UK* (1997) 24 EHRR 1) and commercial speech towards the bottom (see for example *Markt Intern Verlag GmbH and Klaus Beerman v Germany* (1989) 12 EHRR 161).

This spectrum is evident in the degree to which states are permitted to restrict expression. Paragraph 2 of Article 10 permits the state to impose restrictions as long as they conform to the tripartite requirements set out within it: that they are 'prescribed by law'; are intended to meet one of the legitimate aims listed; and are 'necessary in a democratic society' in that they correspond to a pressing social need, are proportionate and the reasons given for the restrictions are relevant and sufficient.

The Strasbourg organs have afforded states a margin of appreciation, or a degree of latitude, on the question of what limitations they decide to impose on expression under Article 10(2). A degree of discretion is left to the state as to what restrictions on freedom of expression are 'necessary in [its] democratic society' (see Jones 1995; Yourow 1996; Mahoney 1997; Lester 1998). In *Handyside* para 48 the Court stated that this doctrine is based upon the premise that:

(b)y reason of their continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

The doctrine has been applied in a variable way depending on what type of expression is at issue. This in turn is dictated by whether there exists a pan-European consensus on the importance of the expression. Thus in cases of artistic expression in which restrictions have been imposed for the protection of morals (for example *Muller*) or to protect the 'rights of others' (for example *Otto-Preminger*) or to control commercial speech (for example *Markt Intern*) where such consensus is apparently lacking, the margin afforded to states has been wide.

Where there is a Europe wide consensus the margin afforded to the state will be narrow. Political expression is said to be vital to the maintenance of that democratic society that is central to the whole ethos of the Convention itself (see Mowbray 1999).⁽⁹⁾

Political speech has received a very high degree of protection from the European Court due to its importance in maintaining democracy. The Court has stressed repeatedly that 'freedom of political debate is at the very core of the concept of

democratic society which prevails throughout the Convention' (see for example *Lingens* para 42).

Expression at election time is of particular importance. In *Bowman v UK* (1998) 26 EHRR 1 para 42, a case concerning expenditure limits placed on persons other than candidates at election time, the Court said:

Freedom of expression is one of the 'conditions' necessary to ensure the free expression of the opinion of the people in the choice of the legislature . . . For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.

It is not just narrow, party political expression which falls within this higher echelon. The Court stated in *Thorgeirson* para 64 that 'there is no warrant in its case law for distinguishing . . . between political discussion and discussion of other matters of public concern'.

The European Court of Human Rights has recently considered the question of broadcast political expression, in the form of advertising, in *VgT Verein Gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4. Swiss law contained a prohibition on broadcasting political advertising (Federal Radio and Television Act s 18). The applicant, a vegetarian organisation, produced a short film contrasting the lives of pigs living in the forest with those kept under factory farming conditions, followed by the injunction 'eat less meat, for the sake of your health, the animals and the environment'. The Swiss broadcaster refused to screen the film on the ground that it was a 'political' advertisement and the Swiss Federal court upheld the ban noting inter alia that it helped to prevent financially powerful groups from obtaining political advantage, to protect public opinion from undue commercial influence and to protect editorial independence from 'powerful political advertising sponsors' (para 21).

The organisation applied to the European Court claiming a breach of Article 10. On the key question of whether the ban was 'necessary in a democratic society' the Court made the point that the Swiss authorities did have a certain margin of appreciation on the question of whether there was a pressing social need to restrict the broadcast of an advertisement. Indeed the margin was 'particularly essential in commercial matters, especially in an area as complex and fluctuating as advertising'(para 69). But the expression here was not regular commercial advertising in the sense that it was intended to persuade the public to buy a particular product. Rather it 'reflected controversial opinions pertaining to modern society in general'. Indeed the very reason the advert was banned by the Swiss authorities was because it was regarded as 'political' (para 70). Because of this the State's margin of appreciation must necessarily be reduced, for what was at stake was 'not a given individual's purely commercial interests, but his participation in a debate affecting the general interest' (para 71). Given that the reasons for the ban were that it was intended to prevent wealthy commercial groups from skewing the political process, and given that the organisation here was evidently not such a group, those reasons cannot have been 'relevant and sufficient' to justify this particular restriction (para 75). Further, there was no prohibition of political advertising in the print media. This disparity may have been due to the more intrusive nature of the broadcast media but the Court said that it must mean that the prohibition cannot have been of a 'particularly pressing nature' (para 74). Thus the ban constituted a breach of VgT's Article 10 rights.

It is interesting to compare the subsequent case of *Murphy v Ireland* (2004) 38 EHRR 13 in which the European Court considered the Irish ban on broadcast religious

advertising. The Court noted that a 'wider margin of appreciation is generally available when regulating expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially religion' (para 67). Indeed it was this margin which distinguished *Murphy* from *VgT* and resulted in the Court finding there to be no violation of Article 10.

Under Article 10, therefore, political expression is afforded a very high degree of protection by the European Court, over and above that afforded to other types of speech. Indeed the ideal of pluralist democracy of which freedom of expression is a vital component is central to the European Convention (Bullinger 1985). It is implicit in the Convention that the courts are the guardians of democracy. Thus, according to the principles sketched out above, a state is accorded only a very narrow margin of appreciation when it comes to deciding what restrictions on political expression are 'necessary in [its] democratic society'.

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6. Party Broadcasts, Freedom of Speech and Judicial Deference

Since the Human Rights Act 1998 (HRA) has been in force a kind of domestic counterpart of the Strasbourg 'margin of appreciation' doctrine has emerged: a so called 'doctrine of deference' whereby judges will defer either because of the democratic credentials of the decision maker, or because the decision falls outside their recognized area of competence, for example in national security, social policy or economic areas (see *R v DPP ex parte Kebilene* [2000] 2 AC 326 *per* Lord Hope at 380-1; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2002] 3 WLR 344 *per* Laws LJ at 376 – 8, Singh 1999; Craig 2001; Edwards 2002; Nicol 2002; Klug 2003).

Given the position at Strasbourg outlined above one would have expected that the degree of deference to be shown by the court to a decision maker purporting to restrict political expression would be very limited. Laws LJ said at the Court of Appeal stage in *ProLife* para 36:

The courts owe a special responsibility to the public as constitutional guardian of the freedom of political debate. This . . . is most acute at the time and in the context of a . . . general election. It has its origin in a deeper truth, which is that the courts are ultimately the trustees of our democracy's framework . . . Freedom of expression is plainly . . . a constitutional right, and its enjoyment by an accredited political party in an election contest must call, if anything for *especially heightened protection*. (emphasis added)

The majority of the House of Lords disagreed. Both Lords Hoffmann (at paras 74-77) and Walker (at paras 132-144) commented at length upon the doctrine of deference. Lord Hoffmann in fact disavowed the use of the term 'deference' with its 'overtones of servility, or perhaps gracious concession'. He emphasized that the question 'of which branch of government has in any particular instance the decision making power and what the legal limits of that power are is one of law for the courts to decide.'

Principles of law dictate which areas are more appropriate for legislative or judicial decision making. Thus 'when a court decides that a decision is within the proper competence of the legislature or executive it is not showing deference. It is deciding the law'. (For comment on this aspect of the case see Jowell 2003). With regard to the taste and decency obligations, he said (at para 77):

the decision to make all broadcasts subject to taste and decency requirements represents *Parliament's* view that . . . 'public opinion cannot be totally disregarded in the pursuit of liberty'. That seems to me an entirely proper decision for *Parliament* as representative of the people to make. (emphasis added)

However Lord Hoffmann did not explain why this is an appropriate area for Parliament to have the last word or, indeed, what 'principle of law' dictated that it was. In fact it is at least arguable that in this type of case the views of Parliament should not be absolutely determinative. If the role of the court as 'constitutional guardian of the freedom of political debate' is to be taken seriously,⁽¹⁰⁾ indeed if it is to have any such role at all, the views of Parliament cannot be determinative in all situations. If Parliament, in modern British society, does indeed derive its legitimacy from its democratic credentials then there must be some decisions which are off limits: in short ones inimical to the very underlying principles of democracy itself (see Laws 1993; Woolf 1995; Allan 2001; cf Griffith 2000; Ekins 2003).

The approach of the Court of Appeal was criticized as being 'fundamentalist' (Lord Hoffmann at para 72). There were hints of accusations that unelected male judges were 'rewriting' Parliamentary instructions to meet their personal and idiosyncratic views.⁽¹¹⁾ Nonetheless, as the Court of Appeal recognized, this was a case in which the legislature had required (albeit obliquely) broadcasters to restrict the way in which a registered political party put its message across to the electorate at election time. Parliament, dominated as it is by the old traditional monolithic groupings with scant representation by single issue parties, is hardly a disinterested mover in this area. If ever there was an example of a subject area where courts should show a minimum of deference to legislative action then the interference with freedom of speech at election time is surely one.

As noted above, the Strasbourg case law points clearly to a hierarchy of expression. The degree of protection to be afforded, and the degree of deference to be accorded, to those seeking to restrict it depends on the type of speech at stake and the precise context of the case. The approach of the Court of Appeal (Laws LJ at para 37 and Simon Brown LJ at para 63) and Lord Scott acknowledges this. Lord Scott, in his dissenting speech, put it thus (at para 65):

The [taste and decency restrictions] were drafted so as to be capable of application to all programmes, whether light entertainment, serious drama, historical or other documentaries, news reports, party political programmes or whatever. But *material that might be required to be rejected in one type of programme might be unexceptionable in another. The judgment of the decision maker would need to take into account the type of programme of which the material formed part as well as the audience at which the programme was directed.* (emphasis added)

The adoption of such a nuanced approach was precluded by the majority of the House of Lords by their finding that the Court of Appeal had 'fallen into error' by failing to distinguish the questions of, firstly, whether PEBs were subject to standards of taste and decency at all and, secondly, if they were, whether the broadcasters correctly applied those standards. It had considered the first of these questions but,

their Lordships held, should not have done so because ProLife had not sought to argue that PEBs could never be subject to such standards at all (Lord Nicholls paras 9 -10; Lord Hoffmann para 49). The only question that was properly before the court was whether the broadcasters had applied the right standards. Given that 'Parliament [had] imposed this restriction on broadcasters and [had] chosen to apply this restriction as much to party broadcasts as to other programmes' (Lord Nicholls para 12) then the broadcasters did not have any choice but to apply them. Thus the majority said that, because the taste and decency standards were not a breach of Article 10 *per se*, it simply became a question of whether the broadcasters applied their legal instructions correctly (Lord Nicholls para 16; Lord Hoffmann para 50).

But just because ProLife did not claim that the application of standards of taste and decency to PEBs was a breach of Article 10 *per se*, did not mean that it could not potentially be on this particular occasion. As Lord Scott put it, the case is 'fact sensitive' and it was the specific application of the standards to this particular broadcast that was being challenged (para 92):

The requirement that broadcasts should not offend good taste and decency or be offensive to public feeling is not necessarily an Article 10 breach in relation to party election broadcasts any more than it is in relation to programmes generally. The issue therefore is . . . a narrow one. It is whether the rejection by the broadcasters of *this particular programme*, the purpose of which was to promote the cause of the Alliance at the forthcoming general election was a lawful application by the broadcasters of the conditions by which they were bound. To put the point another way, was their rejection of the Alliances' desired programme necessary in a democratic society for the protection of the right of homeowners that offensive material should not be transmitted into their homes? (emphasis added)

The majority applied Article 10 globally in deciding whether the standards were a breach of Article 10 at all. The decision that they were not, (or that they did not need to decide because the issue was not argued before them) meant that it became simply a question of whether the broadcasters applied the standards as they saw fit (taking due account of their expertise) with scant recognition given to the category of expression with which they were dealing. The approach of the majority in effect allowed the context and type of expression to be ignored – an approach surely at odds with the well established jurisprudence of the European Court.

It may be that the expression in *ProLife* was difficult to categorise in simple terms - for the graphic depiction of fetuses might more usually be associated with shocking art than political speech as in the case of *R v Gibson* [1990] 2 QB 619 (see Lewis 2002). This indeed may explain some of the judicial unease reflected in the starkly different approaches adopted by the courts. However, whilst there was a superficial similarity to other categories of speech, it is clear that the video in *ProLife* was of an essentially political nature in exactly the same way that the pig film in *VgT*, whilst superficially an example of commercial expression, was found by the European Court to be in substance, political.

There are hints in their Lordship's speeches that the PEB in this case was not really bona fide political expression; that somehow ProLife had perpetrated an underhand manoeuvre in order to be able to secure a platform – the highly prized PEB (Lord Hoffmann at paras 68 – 70; Lord Walker at para 124). Lord Hoffmann said that the ProLife PEB was (para 68)

quite unrelated to the specific policy of encouraging an informed choice at the ballot box. Their views were of electoral concern, at any rate theoretically, to voters in only

six of the Welsh constituencies. And the results, which were not wholly unpredictable, showed that they were of concern to very few of those voters. In any case, abortion is not, in this country, a party political issue. It has, for many years been the practice to allow members of Parliament a free vote on such issues . . . The Alliance broadcast had virtually nothing to do with the fact that a general election was taking place. The election merely gave it an opportunity to publicise its views in a way which would have been no more or less effective at any other time.⁽¹²⁾

There is a certain irony in this suggestion. In particular, as noted above, the majority of the House of Lords criticized the Court of Appeal for second guessing the views of the broadcasters – of acting in the capacity of primary decision maker thus overstepping their proper constitutional role in a ‘fundamentalist’ way. But surely Lord Hoffmann’s approach runs the risk of the court second guessing the views of the electorate themselves. How is the court equipped to determine what is and what is not a relevant issue to be put before the electorate in a general election? Lord Hoffmann made the point that ProLife received only a very few votes and secured no seats – but so what? This is simply to use hindsight to evidence the lack of nexus between the election and the views of ProLife. Moreover there is something of a ‘chicken and egg’ problem posed by this approach. Small political parties campaign on single issues which nevertheless are of major public concern – but without access to the mass media at election time to put their views across in the most effective manner possible it is difficult to see how they will ever be able to garner a greater share of the vote than that recounted by Lord Hoffmann.

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7. Double jeopardy in broadcast speech?

One of the major changes supposedly effected by the HRA has been the adoption of proportionality as a ground of judicial review in human rights cases (see *R (o/a Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 WLR 1622 especially the comments of Lord Steyn at paras 27-8). Thus, as noted above, where the right to freedom of expression is interfered with by a public authority this must be necessary in a democratic society in the pursuit of a legitimate aim. It must correspond to a ‘pressing social need’ and the reasons given for the interference must be ‘relevant and sufficient’. Lord Scott and the Court of Appeal adopted this approach holding that any restriction or interference with the ProLife Alliance’s election broadcast must meet the requirements of Article 10(2). Lord Scott reasoned as follows (paras 85-87) - Article 10 guarantees the right to freedom of expression which includes ‘freedom . . . to . . . impart information and ideas without interference by public authority’. Paragraph 1 expressly permits the licensing of broadcasting by the state. Therefore it was ‘not open to anyone to make private arrangements for the programmes of their choice’. If the context were purely that of private law, the Article would not apply - thus those who write books or plays cannot use Article 10 to insist on them being published or performed. But broadcasting is different – licenses are required by public authority and ‘licenses are granted on conditions that impose restrictions as to the contents of programmes that can be broadcast. So Article 10 is engaged’. Therefore the restrictions that may be imposed must meet the criteria set down in 10(2) - they must be necessary in a democratic society and be in the interests of one of the specified aims – otherwise they will breach Article 10.

It was generally accepted by both the Court of Appeal and the House of Lords that a restriction in order to prevent offence to public feeling could fall within the 'rights of others' category in 10(2) – these rights need not be legal rights still less Convention rights.⁽¹³⁾ And it was accepted that there was nothing to exempt PEBs from standards of taste and decency. So the question hinged on whether the specific restriction in the case - the rejection of the ProLife Alliance's desired broadcast, was 'necessary in a democratic society for the protection of the right of home-owners that offensive material should not be transmitted into their homes?' (Lord Hoffmann para 92). In Lord Scott's opinion it was not. For the broadcaster's decision could not have been reached without fatally undervaluing two factors: firstly the fact that the programme was to be a party election broadcast; and secondly the fact that the only relevant criterion for a justifiable rejection on offensiveness grounds was that it was necessary for the protection of the right of homeowners not to be subjected to offensive material in their own homes. It was factually accurate and not sensationalized and was relevant to a lawful policy upon which candidates were standing for election.

The recent European Court cases of *VgT* and *Murphy* would seem to lend support to this approach. In referring to its own 'supervisory jurisdiction' in *VgT* the Court stressed that its supervision was not (para 68)

limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference . . . in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities were relevant and sufficient.

In *Murphy* para 66 the Court said that

(n)o restriction on freedom of expression . . . can be compatible with Article 10 unless it satisfies, inter alia, the test of necessity as required by the second paragraph of that Article.

This then is the self-perceived role of the European court – an international tribunal distanced from what it described in *Handyside* as the 'vital forces' of countries (para 48).

The approach of the majority of the House of Lords however was fundamentally at variance with this approach. Lord Hoffmann said that the primary right protected by Article 10 is the right of 'every citizen not to be prevented from expressing his opinions' (para 55). In this case the primary right was not engaged at all. For ProLife was not actually prevented from doing anything. 'It enjoyed the same free speech as every other citizen' (para 57). Indeed by virtue of its access to PEBs it had more opportunities than most to get its views across - Parliament had required that broadcasters allow political parties to have air time for PEBs subject to conditions as to qualification and contents - but there was 'no human right to use a television channel' (para 57).⁽¹⁴⁾ Article 10 may have some application – but it was not so as to confer a right to a PEB in the first place (para 58):

The nature of the right in such cases . . . instead of being a right not to be prevented from expressing one's opinions, . . . becomes a right to fair consideration for being afforded the opportunity to do so; a right not to have one's access to public media denied on discriminatory, arbitrary or unreasonable grounds.⁽¹⁵⁾

The Court of Appeal had treated the case as if it involved the primary right not to be prevented from expressing one's political views and had concluded that questions of taste and decency were not adequate ground for censorship. This approach was

mistaken. The correct approach was to ask whether the requirements of taste and decency were a discriminatory, arbitrary or unreasonable condition for allowing a political party free access at election time to a particular medium, namely television (para 62).

Lord Hoffmann was therefore able elegantly to sidestep the need to undertake a full proportionality review of the broadcaster's actions – of whether the restrictions they imposed were really necessary in a democratic society to prevent people being offended in their homes. Instead the standard of review was the lower one of reasonableness, rationality and absence of discrimination. Thus he was able to adopt a 'business as usual' approach and easily consign the decision making power to the broadcasters.

The problem with this approach is that it tends to relegate broadcast expression to a kind of second division in which it can be restricted on less pressing and convincing grounds than other forms of speech. This is an area which is already subject to strict state licensing requirements. After all no one is free to set up and operate their own broadcasting system. So there is something of a double jeopardy here. If you want to communicate via the broadcast media you cannot do so without a licence. Thus your freedom of expression is restricted. But then, according to Lord Hoffmann, by virtue of this very restriction, the degree of protection to be derived from Article 10 is reduced still further. If the state wants to restrict broadcast expression it only needs to show that it has not acted unreasonably, arbitrarily or in a discriminatory manner, rather than showing that the restriction was 'necessary in a democratic society'.

Lord Hoffmann summed up his position with the aphorism that there was 'no human right to be invited to the party and it [was] not unreasonable for Parliament to provide that those invited should behave themselves' (para 73). It might be ventured that this is only because the state had already stepped in to prevent people holding their own parties! (Or perhaps, to push the analogy a little too far, allows certain political groups to hold their own parties [in that it allows them broadcast time] but does not allow them to have music and dancing of their choice [in that they are restricted as to how they convey their message!])

The Strasbourg cases *VGT* and *Murphy* concerned access to broadcasting facilities in the first place and in them the European Court saw its role as ascertaining whether the government's bans on political and religious advertising were proportionate – were they necessary in a democratic society? *ProLife* concerned not access in the first place but restriction once access had, in principle, been granted. Indeed stress was placed by the majority upon the fact that ProLife were not prevented from expressing themselves (indeed they were given more opportunities than most to do so). Rather, they were prevented from expressing themselves in the way they wanted. But it is difficult to see why this should have the consequence of denying ProLife the benefit of full proportionality review. After all the European Court has repeatedly stressed that 'Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed' (see *Oberschlick v Austria* (1994) 19 EHRR 389 para 57; *Jersild v Denmark* (1994) 19 EHRR 1 para 31; *News Verlags GmbH & CoKG v Austria* (2001) 31 EHRR 246 para 39).

The judges in the Court of Appeal put the point forcefully:

There is nothing gratuitous or sensational or untrue in the appellants intended PEB. It is certainly graphic; and as I have said, disturbing. But if we are to take political free speech seriously, those characteristics cannot begin to justify the censorship that was done in this case. Here the image is the message, or a least an important part of it. Certainly I would accept that the pictures do not answer the deep philosophical

questions which the abortion debate generates. But they do show what actually happens. I see no answer to the claim that the appellant is entitled to show - not just tell - what happens. (Laws LJ para 43)

To campaign for the prohibition of abortion is a legitimate political programme. The pictures are in a real sense the message. Words alone cannot convey (particularly to the less verbally adept) the essentially human character of the foetus and the nature of its destruction by abortion. This video provides a truthful, factual and . . . unsensational account of the process. (Simon Brown LJ para 57)

At beginning of the 21st century 'virtually all significant speech is mass speech. The soap box orator, the pamphleteer and individual canvassers now play little part in forming public opinion' (Barendt 1998). To say that broadcast speech does not fully engage the primary right to freedom of expression significantly diminishes the potential efficacy of the broadcast medium for those who wish to use it to put forward political views.

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8. A 'tyranny of pleasure'?

Article 10 ECHR 'is applicable [subject to para 2] not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (*Handyside v UK* (1979-80) 1 EHRR 737 para 49).

In *Castells v Spain* (1992) 14 EHRR 45 (para 42) the European Court held that this was particularly the case in respect of elected representatives of the people. By the same token it is arguable that the expression of those standing for election must also be protected.

In a mature democracy it is surely right that difficult and offensive, yet valid, political messages are put to the electorate as free as possible from anaesthetizing constraints. As Lord Scott put it (para 98):

Voters in a mature democracy may strongly disagree with a policy being promoted by a televised party political broadcast but ought not to be offended by the fact that the policy is being promoted nor, if the promotion is factually accurate and not sensationalized, by the content of the programme. Indeed in my opinion, the public in a mature democracy are not entitled to be offended by the broadcasting of such a programme. A refusal to transmit . . . based on the belief that it would be 'offensive to a very large number of viewers' (letter of 17 May 2001) would not in my opinion be capable of being described as 'necessary in a democratic society . . . for the protection of . . . rights of others'. Such a refusal would be, on the contrary, be positively inimical to the values of a democratic society, to which values it must be assumed that the public adhere.

Indeed it should be remembered that Article 10(1) expressly protects the right of people to 'receive information and ideas without interference' as well as impart them.

Lord Hoffmann stated (para 70) that the rationale for the standards of 'taste and decency' applying to political as well as all other broadcasts was that these standards are 'part of the country's cultural life and have created expectations on the part of the viewers as to what they will and will not be shown on the screens in their homes' (see also Lord Nicholls at para 21). In its letter of 17th May 2001 the BBC stated reason for disallowing the broadcast was that it would be 'offensive to very large numbers of viewers'. Lord Hoffmann (para 32) put store by the fact that the broadcasters do research into their audience's tastes – they are in touch. The area of abortion is one about which 'public opinion is diverse, sometimes unexpected and in constant flux'. Therefore broadcasters who take audience surveys are in a better position than 'elderly male judges' to make the call that the images would be offensive (para 80).

There is surely at least a risk here of instituting what Professor Barendt has termed a 'tyranny of pleasure' (Barendt 1998): that broadcasters only permit to be transmitted into homes that which is anodyne and sanitised or, if the material is potentially shocking, that which shocks for the purpose of providing some kind of thrill. The result of all this is that the majority only get shown what they want to see.

It is said that there is something different in kind about the broadcast media in that there is an implied contract between the viewer and broadcaster – that viewers only let images into their homes on the understanding that they will not be offended by them (see Lord Hoffmann at paras 21-22 citing the opinion of Stevens J in *Federal Communications Commission v Pacifica Foundation* 438 US 726 (1978)). But in the age of the remote control and 'surfing' between multiple channels the idea of an unwanted programme bludgeoning its way into the private sanctity of the living room is anachronistic. This rationale tends to depict viewers as passive recipients, frozen like rabbits in headlights, unable to turn off images they do not want to see. Broadcast after 10.00pm, with a prior warning and perhaps a warning displayed on the screen throughout the transmission there is no reason why a viewer need be subjected to these images for longer than a few seconds.

One of the broadcaster's stated reasons for not allowing the broadcast was the 'cumulative effect of several minutes' of the material (BBC's letter of 17th May 2001). But if it were prevention of offence that was the rationale for the refusal to screen the video the 'cumulative effect' argument can surely have very little weight. For any viewer likely to be offended would certainly turn off or switch channels long before the effect became 'cumulative'.

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9. The Separate but Related Issue of Broadcast Political Advertising

On 27 July 2003 the Communications Act 2003 received Royal Assent. In addition to retaining the taste and decency standards, s 321 of the Act also retains the UK's long standing prohibition on broadcast 'political' advertising.⁽¹⁶⁾

The Government was adamant that it wished to retain the ban as it denies 'powerful interests the chance to skew political debate, safeguards the public and democratic debate, and protects the impartiality of broadcasters' (Tessa Jowell MP, Secretary of State for Culture, Media and Sport (2002) HC Deb vol 395, col. 788, 3 December 2002).⁽¹⁷⁾ However, given the decision of the European Court in *VgT* the Government felt unable to make a statement of compatibility under s 19(1)(b) of the HRA. Instead, very unusually, a section 19(1)(b) statement had to be made to the effect that the Government wished to proceed with the Bill even though it was not possible to make a statement of compatibility.

An analysis of the consequences of the ban on political advertising is beyond the scope of this paper (for a critique of the arguments used to justify the ban see Scott 2003). Suffice it to say that it presents a powerful incentive to challenge by any disgruntled group that wishes to put its (even loosely) political message across in the broadcast media. Furthermore the continuation of the ban makes the decision in *ProLife* even more objectionable. For one of the features of the UK system which, it has been argued, distinguishes it from the Swiss system which was found wanting in *VgT* is the fact that whilst 'political advertising' is prohibited in both countries, the UK has free Party Political Broadcasts which means that it is more likely to be found to be Article 10 compliant than the Swiss system which does not (see Electoral Commission Report 2003, p 17).⁽¹⁸⁾ But *ProLife* now shows that the party broadcast is no more immune from restriction than any other type of expression. It is questionable therefore whether a court examining the system as a whole would be likely to find that it adequately compensates for the blanket ban on political advertising.

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10. Conclusion

The consequences of the *ProLife* decision are far more wide-ranging than the ongoing debate about abortion: a party wishing to campaign on an anti-war stance by showing the horrors of war; or a pro-war stance by showing the evils perpetrated by the target regime; or vegetarianism by showing the butchery of the abattoir; or the death penalty by showing the actuality of execution are all denied the ability to use the broadcast media to its full effect to convey their message.

In recent years broadcasters have pushed the boundaries of taste and decency by broadcasting graphic images of taboo subjects. Notable examples include an autopsy of a human body (*The Autopsy*, Channel 4, 20 November 2002),⁽¹⁹⁾ genital mutilation (*Dirty Sanchez*, MTV, 27 February 2003)⁽²⁰⁾ and images of artists cannibalising a baby and smearing blood on the dead bodies of conjoined twins (*Beijing Swings*, Channel 4, 2 January 2003).⁽²¹⁾ Explicit sexual material is depicted after the 9.00 pm 'watershed' on too regular a basis to recount. In some of these cases complaints are upheld by the regulatory authorities. In others they are not. Usually the broadcasters mount vigorous defences. In many of these programmes

the aim is to provoke thought and debate – although in some it may be simply to provide a frisson in viewers. But in *ProLife* political expression, which, according to the jurisprudence ought to be accorded the highest level of protection, was subjected to prior restraint (see Barendt 1985 and 2003; Mill 1980).⁽²²⁾ Their broadcast was not even allowed onto television screens – the debate was not even entered into. Indeed it might be said that the broadcasters showed noticeably more reluctance to take risks on behalf of a party broadcast than they tend to in respect of their own programmes. *ProLife* presents the ironic spectacle of broadcasters, so often to be seen wielding the sword in defence of freedom of expression, acting as censors.

Modern Britain is a place notorious for its political apathy, at least in party political terms. The turnout at the 2001 general election was 59% - the lowest since 1918. Among 18 – 24 year olds the turnout was 39% (The Independent, 4 July 2001). The House of Commons Public Administration Select Committee has described the situation as one of ‘civic crisis’ (First Report 2001, para 4). It is perhaps not too great an exaggeration to suggest that people would rather vote on ‘Big Brother’ than in a general election (The Guardian, 23 May 2001).

Television is the most pervasive (and arguably the most powerful) means of mass communication. It is one of the media by which enthusiasm could potentially be re-injected into civic and political life. The Electoral Commission has recommended the retention of Party Broadcasts for these very reasons saying that the ‘principle that political parties should freely be able to publicise their platforms and policies to voters and that voters should be able to receive such information is a vital one’ (Electoral Commission Report 2003, p 3). It further urged that parties should be ‘innovative in their design and production of PPBs’ (p 36).

Lord Scott said in *ProLife* (at para 99):

In an era of voter apathy a mind set of broadcasters which rejects a PEB on an undeniably important issue, on the ground that it would be offensive to large numbers of the voting public denigrates the voting public, treats them like children who need to be protected from the unpleasant realities of life, seriously undervalues their political maturity and can only promote . . . voter apathy.

The decision in *ProLife* is a poor one for many reasons – but particularly so because extremely difficult material is regularly shown for the purposes of news and current affairs reporting, creating a frisson, toying with a taboo or, in some cases, merely providing titillation. But put similarly difficult images in an election context, where individuals might actually be presented with the stark reality of having to exercise democratic responsibility, and broadcasters baulk at the thought of breaching regulations that they otherwise seem quite prepared to flout. And the House of Lords, it seems, is unwilling to stand up for free speech in the medium were it could be most influential and where the subject matter ought to be most jealously guarded.

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⁽¹⁾ The Broadcasting Act 1990, s 36(1)a provided that any licence granted to any independent broadcaster had to contain conditions requiring the broadcaster to include 'party political broadcasts' (PPBs) in its service. The Communications Act 2003 s 333 retains this requirement. Such licenses were granted by the Independent Television Commission. Whilst the BBC has no such obligation it has voluntarily made airtime available for PPBs since the 1950s as part of its obligation to provide a 'public service for disseminating information, education and entertainment'.

⁽²⁾ There is no special definition of PPBs and PEBs; the latter is simply a PPB made before an election. Prior to the 2001 general election the BBC and independent broadcasters agreed rules for the allocation of PEBs to political parties such that a party would secure airtime in a particular region if it fielded candidates in one-sixth of the seats in that area.

⁽³⁾ The Communications Act 2003 s 319 imposes the duty to set standards on the new Office of Communications (Ofcom). S 319 (2) (f) requires that one of the 'standards objectives' be 'that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material'.

⁽⁴⁾ The 1996 Charter provides in clause 7(1)b that the Governors must satisfy themselves that all activities of the Corporation are carried out in accordance with any agreement which may be made between the Corporation and the Secretary of State. The current Agreement, Cmnd. 3152 (25 January 1996) provides in clause 5(1)(d) that all programmes it transmits do not ' . . . include anything which offends against good taste or decency'. In order to try and ensure some degree of

harmonisation in the application of 'taste and decency' standards broadcasters had to produce a code – the ITC's version being called the 'ITC Programme Code' (Broadcasting Act 1990, ss 6(3), 90(5)) and the BBC's 'The BBC Producer's Guidelines' (BBC Agreement para. 5.3). The Broadcasting Act 1996 set up the Broadcasting Standards Commission (BSC). Under s 108 it had a duty to draw up a code giving guidance as to standards of taste and decency. Under s 109 it was under a duty to monitor programmes in relation to taste and decency. The Communications Act 2003 transfers the powers and duties of the BSC to OFCOM. Section 319 requires OFCOM to set standards for programme contents.

⁽⁵⁾ Laws LJ stressed the common law's recognition and protection of fundamental constitutional rights, especially freedom of speech at election time (para 36). Simon Brown LJ based his approach more directly on Article 10 ECHR (para 50).

⁽⁶⁾ The majority comprised Lords Nicholls, Hoffmann, Millett, and Walker. Lord Scott was the sole dissident. Lord Millett, who did not give a full speech, said that whilst he had 'for a long time been of the contrary view' was persuaded by the reasons given in the speech of Lord Nicholls.

⁽⁷⁾ A variation on the argument from truth can be seen in the American First Amendment case law, particularly in the 'free market of ideas' jurisprudence of Oliver Wendell Holmes. See *Abrams v United States* 249 US 616 (1919) (dissent of Holmes J). See also *Schenk v United States* 249 US 47 (1919) (judgment of Holmes J).

⁽⁸⁾ A distinct but related argument is that from moral autonomy (Dworkin 1977; 1996).

⁽⁹⁾ The Preamble to ECHR stresses the importance of 'effective political democracy'. Several Articles provide that rights can only be restricted if 'necessary in a democratic society'.

⁽¹⁰⁾ Lord Walker did seem to cast some doubt on this proposition (at para 137).

⁽¹¹⁾ Lord Hoffmann cited with approval Andrew Geddis' article (Geddis 2003) in which he says 'apart from the confident assertion by Laws LJ of the courts' – his – role as "constitutional guardian", what else really justifies unelected judges making decisions as to how the country's electoral processes will be shaped?'

⁽¹²⁾ Lord Hoffmann cited (at para 69) the fears of the Electoral Commission voiced in its January 2003 Report – that there would be an 'incentive for organisations to register as political parties and field sufficient candidates in order to qualify for PPBs which would not only provide access to the media that would not otherwise be available but would enable material to be broadcast that would not otherwise be allowed'.

⁽¹³⁾ In *Chassagnon v France* (1999) 29 EHRR 615 para 113 the European Court said that 'only indispensable imperatives can justify interference with enjoyment of a Convention right'. It might be questioned whether the avoidance of offence to a potentially small number of viewers would constitute an 'indisputable imperative' (see Barendt 2003).

⁽¹⁴⁾ Lords Nicholls and Walker made the same point at paras 8 and 126 respectively.

⁽¹⁵⁾ Lord Hoffmann cited several cases in support of this proposition: *Benjamin v Minister of Information and Broadcasting* [2001] 1 WLR 1040; the European

Commission on Human Rights decisions in *Haider v Austria* (1995) 83 DR 66 and *Huggett v UK* (1995) 82A DR 98.

[\(16\)](#) The previous ban was under s 8 and s 92 of the Broadcasting Act 1990. The term 'political' had been interpreted very widely to include even a radio advertisement by Amnesty International designed to bring attention to the unfolding genocide in Rwanda in 1994 (*R v Radio Authority ex parte Bull* [1996] 2 All ER 501). Section 321(3) a-g defines the terms 'objects of a political nature' and 'political ends' to include for example 'bringing about changes in the law' and 'influencing the policies of local regional or national governments'.

[\(17\)](#) Note the similarity to the reasons advanced by the Swiss government in *VgT* (2002) 34 EHRR 4 para 21.

[\(18\)](#) As a response to the Electoral Commission Report the Government has recently published a consultation paper soliciting public views on the future of PPBs: Party Political Broadcasting: Public Consultation (Consultation Paper 2004).

[\(19\)](#) Broadcast at 11.05 pm. Complaint to BSC not upheld - Bulletin 56. See *The Guardian* 21 November 2002.

[\(20\)](#) Complaint to BSC upheld - Bulletin 66.

[\(21\)](#) Broadcast at 11.45 pm. Found by the ITC to be in breach of s 1.1 of its Programme Code. Bulletin 10 (10 March 2003). Channel 4 refused to accept the ruling citing its right to present challenging material. See *The Guardian* 10 and 11 March 2003.

[\(22\)](#) The European Court of Human Rights has stressed that prior restraint calls for 'special scrutiny' *Observer and Guardian v UK* (1991) 14 EHRR 259 para 60. For the ProLife Alliance this was critical because, by the time the case reached the Court of Appeal, the General Election had taken place.