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Balancing freedom of political expression against equality of political opportunity: the courts and the UK's broadcasting ban on political advertising

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***P.L. 89** Of all forms of expression, political expression receives the highest level of protection under art.10 of the European Convention on Human Rights (ECHR). The European Court of Human Rights (the Court) has stated on numerous occasions that freedom of expression constitutes one of the essential foundations of democratic society.¹ Freedom of political debate is said to be at the “very core of the concept of democratic society which prevails throughout the Convention”.²

***P.L. 90** Expression is therefore valued for instrumental reasons, being regarded as a sine qua non of political democracy.³ Furthermore, political democracy is at the very hub of the system of rights protection provided for under the ECHR.⁴ The Court has stated that democracy appears “to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it”.⁵

By the same token the courts in the United Kingdom have stressed the importance of expression under the common law in terms of its contribution to democracy. For example, in *R. v Secretary of State for the Home Department Ex p. Simms*, Lord Steyn 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.”⁶

Since, according to courts at any rate, political democracy is the main virtue whose preservation bestows upon freedom of expression its great value, it follows that the preservation of democracy itself must be of equal, if not greater, importance. Thus, the question arises of what should be done when unfettered freedom of expression threatens to undermine the integrity of democracy itself? This conflict most obviously arises where political organisations espouse policies that, if put into effect, would subvert democratic processes and institutions.⁷ However it may occur, not just because of the *content* of the message, but also because of the nature of the *medium* in which the message is conveyed.

Despite the growth of the internet in recent years, the most powerful medium of modern mass communication would appear to remain that of broadcasting. It can be used to communicate messages to millions of people in persuasive, seductive and effective ways. For this reason broadcasting is one of the most popular and successful tools of the commercial advertiser. Yet broadcast advertising can be used, not solely by companies wishing to advertise branded products, but also by organisations with political or quasi-political agendas wishing to communicate their message and persuade people to their way of thinking. It immediately becomes apparent that those organisations willing and/or able to purchase air time will be at a significant advantage in ***P.L. 91** the game of political persuasion as compared to those organisations unwilling and/or unable to afford such expenditure. There will be a tendency for the field of political discourse to be tilted in favour of the wealthiest players, and this will create a risk that equality of opportunity in the democratic process

will be undermined.

There exists, therefore, a tension between *freedom* of political expression --which includes the freedom to communicate one's message in the medium of one's choice--and the *equality* of opportunity to communicate one's message in as effective a way as possible.⁸ There are obvious problems with setting the balance too far in favour of freedom of expression. As Cass Sunstein has put it in the context of First Amendment challenges to legislative restrictions on campaign expenditure in the United States:

"People who are able to organise themselves in such a way as to be able to spend large amounts of cash should not be able to influence politics more than people who are not similarly able ... it is most troublesome if people with a good deal of money are allowed to translate their wealth into political influence. It is equally troublesome if the electoral process translates poverty into an absence of political influence."⁹

In the United States this tension has, nevertheless, been resolved very much in favour of freedom of speech. In *Buckley v Valeo* the Supreme Court held that laws which placed limitations on campaign expenditure were in breach of the First Amendment.¹⁰ The Court said that "the concept that the Government may restrict the speech of some in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment".¹¹ Moreover, the Court added that if the purpose of such laws was to promote political equality they would be constitutionally unacceptable.¹²

Closely related to the substantive question of how the appropriate balance should be struck between freedom of political expression and equality of political opportunity, there is an equally important procedural question: what should be the role of the *court* in the adjudication of challenges to the balance that has been struck by the democratically elected legislature? Should it adopt an attitude of activism or restraint?

***P.L. 92** In *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport (ADI)*, the House of Lords considered the question of whether the statutory ban on "political" advertising on UK radio and television is compatible with the right to freedom of expression under art.10 ECHR.¹³ Their Lordships answered this question in the affirmative. This article seeks to explore the issues sketched out above through the prism of this decision. To this end the article will outline the domestic statutory position in relation to broadcast political advertising, the case law of the European Court of Human Rights and the decision in *ADI* itself. Then the reasons advanced by the House of Lords for its adoption of a stance highly deferential to Parliament's decision to impose a blanket ban on all "political" broadcast advertising will be subjected to critical analysis. The next part will examine the implications of obiter dicta in their Lordships' speeches suggesting that, given one of a number of different factual matrices the ban could, in the future, be found to breach art.10 after all. The article concludes with the suggestion that these dicta seriously undermine the efficacy of the ban. Moreover, it is argued that their Lordships' dicta reveal a deep ambivalence concerning both the substantive question of what is the correct balance to be struck between freedom of expression and equality of political opportunity; and the procedural question of what is the proper role of the court itself when undertaking judicial review of this aspect of the democratic process.

The United Kingdom's ban on broadcast political advertising, the Strasbourg position and the decision in ADI

In the field of broadcasting the United Kingdom has historically adopted an approach which favours equality of political opportunity at the expense of freedom of political expression. A succession of statutes regulating broadcasting have maintained a ban on political advertising in the broadcast media.¹⁴ The most recent, the Communications Act 2003, prohibits the broadcasting of political advertisements on television and radio.¹⁵ Under s.321 an advertisement will contravene this prohibition if it is "by or on behalf of a body whose objects are wholly or mainly of a political nature"¹⁶ or is an "advertisement which is directed towards a political end".¹⁷ Section 321(3) defines "objects of political nature" and "political ends" widely so as to include: "influencing the outcome of elections or referendums"¹⁸ ; "bringing about changes in the ***P.L. 93** law ... or otherwise influencing the legislative process"¹⁹ ; "influencing the policies or decisions of governments"²⁰ ; "influencing the policies or decisions of persons on whom public functions are conferred by law"²¹ or "international agreements"²² ; "influencing public opinion on a matter which, in the UK, is a matter of public controversy"²³ ; and "promoting the interests of a party or other group of persons organised in the UK or elsewhere for political ends".²⁴

During the passage of the Communications Bill Tessa Jowell MP, Secretary of State for Culture, Media and Sport, explained the rationale for this prohibition along the following lines:

“By denying powerful interests the chance to skew political debate, the current ban safeguards the public and democratic debate, and protects the impartiality of broadcasters.”²⁵

The driving force behind the political broadcasting ban apparently lies in concerns over electoral and party political matters. Its reach, however, is far wider, neither being restricted to advertising at or around election periods, nor to advertisements placed by political parties alone. Indeed its wide terms will catch any “social advocacy advertising” which aims to affect public opinion on matters of controversy.²⁶ Furthermore, even though the policy behind the ban is to prevent the playing field of political debate being distorted by wealthy interests, it will also ensnare those with modest resources, who lack the financial muscle to skew the pitch in their favour. The question thus arises whether this blanket ban on political advertising, so widely defined, can meet the strictures of proportionality required to justify interference with the right to freedom of expression under the ECHR?

***P.L. 94 The Strasbourg position**

As noted above, the European Court has been assiduous in its general protection of political expression.²⁷ It applied this free speech jurisprudence to the issue of a ban on political broadcast advertising in *VgT Verein gegen Tierfabriken v Switzerland*.²⁸ The purpose of the Swiss ban was to:

“Protect public opinion from the pressures of powerful financial groups and from undue commercial influence and to provide a certain equality of opportunity among different forces in society, to ensure editorial independence from powerful sponsors and support the press.”²⁹

VgT, an animal rights organisation, made a short commercial in response to adverts by the meat industry. The advert compared, unfavourably, the lives of factory farmed pigs with those of their forest dwelling counterparts and concluded by imploring viewers to “Eat less meat, for the sake of the animals, your health and the environment”. VgT was prevented from broadcasting the commercial in accordance with Swiss law on the grounds that it was “political”.³⁰ Having failed to secure redress in the Swiss court, VgT applied to Strasbourg claiming a breach of art.10 ECHR. The European Court accepted that the aim of protecting equality of opportunity in the political process was legitimate and that some restrictions in pursuit of this aim may be permissible.³¹ However the *blanket* ban constituted a disproportionate interference with freedom of expression, since VgT was patently not one of those wealthy groups that the ban had in its sights. The Court observed that all VgT intended to do was to “participate in an ongoing general debate on animal protection and the rearing of animals”.³² Thus, the reasons for the ban were held by the Court not to be “relevant and sufficient”.³³ Moreover, because this was a restriction of political expression (albeit in the context of broadcasting commercials, an area in which a considerable degree of latitude is usually granted to states) the margin of appreciation to be afforded was necessarily narrowed.³⁴

In contrast to its decision in *VgT* the Court in *Murphy v Ireland* held that a broadcasting ban on *religious* advertising in Ireland did not infringe the art.10 ***P.L. 95** rights of a pastor who wished to publicise a religious meeting. The Court distinguished *VgT* on the basis that a wider margin of appreciation should “generally” be accorded to states in the field of religion.³⁵

The decision in *VgT* posed problems for the UK Government during the passage of the Communications Bill. Indeed, the Government was so unsure about the compatibility of the ban during the passage of the Bill it took the highly unusual step of making a statement under s.19(1)(b) of the Human Rights Act 1998 (HRA) to the effect that it was unable to make a statement that the Bill was compatible with Convention rights. Many of the issues underpinning this decision were considered recently by the House of Lords in the *ADI* case.

The House of Lords and ADI

Animal Defenders International is a non-profit, non-charitable organisation which campaigns to alleviate the suffering of animals. It wished to air a television advert to publicise a campaign entitled “My Mate's a Primate”, highlighting the misuse and abuse of primates by humans. Clearance for the advert was however declined on the basis that ADI was a body whose objects were “mainly of a political nature”.³⁶ ADI therefore applied for judicial review, seeking a declaration under s.4 of the HRA that the statutory ban was incompatible with its rights under art.10 ECHR on the grounds of proportionality.³⁷

On the face of it the Strasbourg case law seemed to weigh heavily in favour of ADI, because the facts of its case and those of *VgT* appeared to be “very similar”.³⁸ Moreover, neither *VgT* nor ADI were the kind of groups that had sufficient resources to skew the democratic process by buying up large chunks of airtime. Nevertheless, the Divisional Court declined to grant the declaration sought. Instead, it held that the ban was aimed at *supporting* the democratic process by preventing unfair advantage being obtained by those groups that were able and willing to pay for advertising in the most potent and pervasive of media.³⁹

The House of Lords unanimously upheld the decision of the Divisional Court in a “leap-frogged” appeal.⁴⁰ The key issue was whether the statutory ban was “necessary in a democratic society”. Reciting the freedom of speech side of the equation, Lord Bingham noted that “free communication of *P.L. 96 information, opinions and argument about laws which a state should enact and policies its government ... should pursue [was] an essential condition of truly democratic government”.⁴¹ However, he added that it was also “highly desirable that the playing field of debate should as far as possible be level”.⁴² Lord Bingham proceeded to enunciate the classical “equality of opportunity” argument:

“This [level playing field] is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction. Nor is it achieved if well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious. The risk is that objects which are essentially political may come to be accepted by the public not because they are shown by public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them. The rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must ... include a right to be protected against the potential mischief of partial political advertising.”⁴³

The crucial question, of course, was whether a *complete prohibition* on all broadcast “political” advertisements, as defined in ss.319 and 321, could be considered to be a proportionate restriction on the freedom of expression of an organisation that was clearly not one of those moneyed interests whose domination of the airwaves the legislation sought to guard against. After all, it might have been possible to have created a more nuanced statutory regime that would have rationed airtime or capped expenditure so as to prevent such dominance and consequent distortion of the playing field, yet still would have allowed groups such as ADI to use television to get their message across. However, Lord Bingham declined to pursue this line of inquiry. In his view it was difficult to see how any system of rationing or capping could be devised that would not be circumvented, and it would be difficult to envisage any such system not according excessive discretion to officials, thereby leading to many legal challenges. Lord Bingham pointed out that broadcasters had a duty to present a “fair, balanced and reasonably comprehensive cross-section of public opinion on the issues of the day”, and that this difficult task would be rendered even harder if account had to be taken of political advertising. Furthermore, he observed that the “Government had considered that no fair and workable compromise solution could be found which would address the problem--a judgment which Parliament accepted” and which his Lordship saw “no reason to challenge”.⁴⁴

*P.L. 97 Lord Bingham also pointed out that whilst *broadcast* political advertisements were prohibited, other media outlets remain available such as newspapers, magazines, direct mailshots, billboards, public meetings and marches.⁴⁵ There did not exist, as the European Court had found there to have been in *Bowman v UK* (a case involving a £5 limit on third party expenditure at election time), a *total barrier* to the communication of ADI's views.⁴⁶ Lord Bingham noted that differential treatment of the broadcast media was justified and because of the “greater immediacy and impact of television and radio advertising ... it [was] not really a matter of serious debate but that the broadcast media [was] more pervasive and potent than any other form of media”.⁴⁷

Notwithstanding these arguments, the House of Lords still had to deal with the Strasbourg judgment of *VgT* which, as noted above, strongly suggested that such an all encompassing ban would constitute a breach of art.10 and which, by virtue of s.2 of the HRA, had to be “taken into account ... in so far as, in the opinion of the court ... it [was] relevant to the proceedings”. In the event, however, *VgT* was side-stepped with apparent ease. Lord Bingham considered that the argument that it was necessary to keep the “playing field of debate ... so far as practicable level” had not been “deployed” to its “full strength” in *VgT*. Furthermore, *VgT* was distinguishable as in that case the applicant had been seeking to *respond* to commercials broadcast by the meat industry.⁴⁸ In addition, Lord Scott stressed that judgments of the European Court were highly fact sensitive, so that it was “perilous to

transpose the outcome of one case to another where the facts are different”⁴⁹.

It is important to bear in mind the insistence of the European Court that in cases such as this, involving “controversial opinions pertaining to modern society in general”, the margin of appreciation available to the state *P.L. 98 is reduced.⁵⁰ One might have thought that the limited margin of appreciation granted by the European Court would have been reflected, at municipal level, in a narrow discretionary area of judgment being afforded by the domestic court to the legislature. However, all three judges who made full speeches in *ADI* agreed that this was a case in which it was appropriate for them to show deference to the judgment of Parliament.⁵¹ Lord Bingham noted that there was no settled practice among European states on the issue of political advertising, “a factor tending to widen the margin of appreciation” and it “may be that each state [was] best fitted to judge the checks and balances necessary to safeguard, consistently with Art.10, the integrity of its own democracy”.⁵²

Judicial review of the “devices of democracy”

The case of *ADI* poses important questions about the proper role of the courts as overseers of the democratic process.⁵³ Frederick Schauer, writing in the context of First Amendment challenges to legislative restrictions on campaign finance in the United States, touches on the fundamental question at the centre of the case:

“Absent textual or historical guidance, how are we to think about the case in which some democratic body--say, a legislature--makes a decision about the devices of democratic process themselves? Is the appropriate posture toward a legislative act that specifies democratic procedures to be one of deference or one of skepticism? It is at this point that the questions about the status of democratically enacted procedural decisions are squarely before us, and it is at this point that we confront the central question of the proper role, if any, of courts as overseers of democratic procedure.”⁵⁴

A “posture ... of deference”

The question of the court's role in the judicial review of this “device ... of democratic process” under the HRA has been considered by the House of Lords before in *R. (on the application of the ProLife Alliance) v BBC*.⁵⁵ This case *P.L. 99 concerned a refusal by the BBC and independent broadcasters to transmit a Party Election Broadcast (by an anti-abortion political party) which graphically depicted an abortion, on the grounds that such a broadcast would infringe statutory and “quasi-statutory” standards of taste and decency.⁵⁶ The party, the ProLife Alliance, challenged the refusal, though not the compatibility of the taste and decency guidelines themselves, claiming that it constituted a breach of its rights under art.10 ECHR. The Court of Appeal agreed and adopted a posture of “skepticism” with regard to the broadcaster's decision. Laws L.J. held that the case concerned “censorship of political speech”, and affirmed that it was “difficult to think of a context in which the claims of free expression [were] more pressing”.⁵⁷ The court had an “overarching” constitutional responsibility to protect political speech and, as a consequence, “had to decide for itself whether this censorship was justified”. Thus the Court of Appeal concluded that, in the context of the “cockpit of a general election”, the weight to be accorded to the broadcaster's views were “modest at best”.⁵⁸

The majority of the House of Lords, however, roundly rejected what Lord Hoffmann referred to as this “fundamentalist” approach.⁵⁹ In the absence of a compatibility challenge to the guidelines themselves, the majority considered that they had to defer to the greater expertise of broadcasters who were merely imposing taste and decency standards set down by Parliament. Lord Hoffmann considered that, “[g]enerally accepted standards on these questions [were] not a matter of intuition on the part of elderly male judges”.⁶⁰ The Court of Appeal had “carried out its own balancing exercise” between the requirements of freedom of political speech and the protection of the public from being distressed--and “that was not a legitimate exercise for the courts in this case”--for Parliament had decided where the balance should be struck.⁶¹

In *ADI* the House of Lords likewise adopted, to use Schauer's phrase, a “posture ... of deference”. The judgment of their Lordships crucially hinged upon their acceptance that Parliament was in the best position to make decisions about the “devices of democratic process”, even in the face of strong authority to the contrary from the European Court of Human Rights. Lord Bingham *P.L. 100 explained that there were three main reasons for giving “great weight” to the judgment of Parliament:

- it was “reasonable to expect that our democratically elected politicians will be particularly sensitive to

the measures necessary to safeguard the integrity of our democracy”;

- Parliament had passed the legislation even though the Minister had made a statement under s.19(1)(b) of the HRA to the effect that she was unable to make a statement of Convention compatibility; and
- legislation could not be framed to address particular cases, it had to lay down “general rules” and general rules meant that a “line must be drawn, and it [was] for Parliament to decide where”.⁶²

Since the affording of this wide discretion was determinative for the disposal of ADI's appeal, these three reasons warrant further analysis.

Elected politicians are particularly sensitive to the needs of our democracy

Traditionally two basic justifications have been advanced for courts showing deference to other constitutional actors. The first of these relates to “democratic legitimacy”. As Sandra Fredman explains:

“... where there are no predefined legal standards and opinions might reasonably differ on the outcome, decisions can only be made by weighing up different interests according to political criteria. Judges have no legitimate means to make such decisions: they can only be taken by those who must be responsive to the range of affected interest groups and face the consequences of their decisions through their accountability to the electorate.”⁶³

The second relates to the “relative institutional competence” of the decision makers in question. Sandra Fredman, again, notes that:

“... judges are not competent to make decisions where the facts are not accessible to the courts, either because, like national security, they need to be kept secret, or because, like socio-economic policy, they are wide-ranging and polycentric. The bipolar, reactive, dispute-based nature of judicial processes means that judges cannot achieve the wide lens necessary to make polycentric decisions.”⁶⁴

The first of Lord Bingham's reasons for affording “great weight” to Parliament's judgment consists of a conflation of these two justificatory principles, stressing **P.L. 101* as it does the *democratically elected* nature of politicians and their *particular sensitivity* to the measures necessary to safeguard democratic integrity.

At first blush it certainly seems to be right that democratically elected politicians are best placed to decide on the measures necessary for the protection of democracy itself.⁶⁵ After all, they are democratically accountable to the electorate--if the majority do not approve of what they do, they can be voted out. In addition they have specific and unrivalled expertise in the “devices of democracy” themselves--the process, mechanics and machinations of democratic process--in other words they have institutional competence. It is perhaps not surprising therefore that the House of Lords adopted a deferential stance. Parliament and its MPs would seem to be in an unassailable position as regards decision making on the questions of how the nuts and bolts of our democracy should function--in particular in this context, how far freedom of expression should be restricted in order to maintain the level playing field of political discourse.

On reflection, however, this coincidence of democratic legitimacy and institutional competence is not quite as impregnable as it first appears. It is a truism that the very democratic legitimacy of MPs means that they have a vested interest in the type of process being as favourable to them as possible. The fact that they are, in Lord Bingham's phrase, “particularly sensitive to the measures necessary to safeguard the integrity of our democracy”, actually works against the contention that they have democratic legitimacy in this context. Frederick Schauer summarises the point:

“... [D]ebates over democratic procedure are often motivated by the combatants' respective views about which procedure will best serve their own substantive interests ... procedural decisions are made largely by selecting the procedures most likely to favour those doing the selecting.”⁶⁶

MPs are not disinterested actors doing the bidding of the electorate; they have a very real interest in how the process plays out. Their institutional competence is down to the fact that they are steeped in the world of party politics, and this must actually *count against* the assertion that they should be afforded deference on account of their democratic legitimacy, at least in this particular context.⁶⁷

The section 19(1)(b) statement

The second reason given by Lord Bingham for why the judgment of Parliament “should not be lightly overridden” was that it had “resolved uniquely, since **P.L. 102* the 1998 Act came in to force in October 2000, that the prohibition of political advertising on television and radio may possibly though improbably, infringe Art.10 but has nonetheless resolved to proceed under s.19(1)(b) of the Act”.⁶⁸

Section 19 of the HRA requires that Ministers responsible for government Bills must either make a written statement that, in their view, the Bill is compatible with Convention rights (s.19(1)(a)) or that, even though they are unable to make such a statement, they wish the House to proceed with the Bill anyway (s.19(1)(b)). The s.19 requirement was introduced so that in the early stages of a Bill's development it would be possible to identify potential conflicts with Convention rights, consider alternative means to secure the aims of legislation in a more rights compliant way, and “reach a judgment about whether the proposed legislative goal and means are justified despite their adverse implications for rights”.⁶⁹

Hitherto the status of s.19 statements has been down-played by the judiciary. In *R. v A*, Lord Hope said that s.19 statements,

“... may serve a useful purpose in Parliament. They may also be seen as part of the parliamentary history, indicating that it was not Parliament's intention to cut across a Convention right ... But they are no more than expressions of opinion by the minister. They *are not binding on the court, nor do they have any persuasive authority.*”⁷⁰

Clearly this reluctance to give weight to s.19 statements can be explained in terms of judicial independence and the separation of powers. If the judges were to take such statements into account as indicative of Convention compatibility, it would undermine their constitutional role as interpreters of legislation.⁷¹ Moreover, it would significantly diminish the powers conferred by ss.3 and 4 of the HRA itself, if the balance of judicial decisions on human rights could be tipped by the presence of a s.19(1)(a) statement.

**P.L. 103* All this is readily understandable in terms of ministerial statements of compatibility under s.19(1)(a). However, the decision in *ADI* involved a strange twist on this logic: one of the key factors leading Lord Bingham to afford a wide discretion to Parliament in the case, thus allowing the contested provisions to be found compatible with art.10, was the ministerial statement to the effect that the measure was possibly (or probably⁷²) *not* compatible with art.10. This statement of possible (or probable) non-compatibility was then used as evidence of the provision's compatibility. This cuts directly against the received judicial wisdom on the relevance of s.19 statements; that they are not binding nor do they have even persuasive authority.⁷³ But it is also, surely, verging on judicial doublethink. Even though the executive that introduced this Bill, and the legislature that passed it, clearly had serious doubts about its compatibility, the House of Lords nevertheless took this as one of the factors requiring it to defer to Parliament's presumed “hope” that the measure might be compliant with the ECHR after all.

A line must be drawn somewhere: if you are on the wrong side of it--tough!

Lord Bingham's third stated reason for showing deference to Parliament was that,

“... legislation cannot be framed so as to address particular cases. It must lay down general rules ... A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.”⁷⁴

This strong statement in favour of accepting Parliament's view of when and where “bright lines” should be drawn in legislation perhaps tends to belie the complexity of the true position. In *The Concept of Law*, H.L.A. Hart recognised that there exists a fundamental tension in all legal systems between the need for laws to be certain so that individuals are able to conduct their lives in a reasonably predictable environment, and the need for laws to be sufficiently flexible or fact-sensitive so as to be able to take account of differing factual situations.⁷⁵ Indeed, in the case law of the European Court and under the HRA, there have been many cases in which general rules have been found to constitute disproportionate interferences with Convention rights on account **P.L. 104* of their being insufficiently sensitive to the particular circumstances of those affected.⁷⁶

As Sales and Hooper explain, one of the main factors that the courts take into account in deciding whether a fact-insensitive law constitutes a proportionate interference with a Convention right is the degree of difficulty that the state would encounter if it chose to introduce a more fact-sensitive rule. Thus, for example, the question of whether a more fact-sensitive law would frustrate the ability of the state to pursue its primary policy aim or whether the affording of discretion to those charged with applying the law might cause problems.⁷⁷

During the passage of the Communications Bill, the Joint Committee on Human Rights (JCHR), while acknowledging the need to protect “equality of opportunity for political expression”, voiced concerns over the possible incompatibility of a total ban on political advertising on television and radio in the light of the *VgT* judgment.⁷⁸ The JCHR recommended that the “Government examine ways in which workable and Convention-compatible restrictions of this kind could be included in the Bill”.⁷⁹ The Government responded that it had considered,

“... an alternative regime based on specific prohibitions, such as banning all party political advertising, and all political advertising of any kind around the time of elections or referenda, coupled with other rules to avoid the predominance of any particular point of view, to provide visual or audible identification of political advertisements, and to control the scale of political advertising in terms both of broadcasting time and the proportion of advertising revenue that a broadcaster is permitted to derive from political advertising. *We have concluded that it would be very difficult to make such a scheme workable*, and that in any event it would fall significantly short of the present outright ban and allow a substantial degree of political advertising to be broadcast.”⁸⁰

It will be readily apparent that this consists of little more than a bald assertion akin to saying “we have gone away and looked at some possible alternatives *P.L. 105 and, trust us, they really aren't workable”. Nevertheless, the JCHR accepted it at face value. Moreover, the JCHR took the view that the Government's decision to press ahead did not evince a lack of respect for human rights and was legitimate in the circumstances.⁸¹

In *ADI* their Lordships did not explicitly relate the history of the debate during the passage of the Bill to the assertion that “a line must be drawn” somewhere. However Lord Bingham did narrate the history of this debate in detail.⁸² He briefly considered the reasons for discounting alternative, more nuanced, restrictions, concluding that “the Government judged that no fair and workable compromise solution could be found which would address the problem, a judgment which Parliament accepted” and which he saw “no reason to challenge”.⁸³

It is instructive to compare the brevity of the reasoning and debate over the Communications Bill with the extremely long, detailed and comprehensive reasoning proffered by the Irish Government during the parliamentary debate concerning a 1999 Bill to remove the legislative ban on broadcast religious advertising.⁸⁴ In *Murphy* the European Court drew upon this detailed reasoning.⁸⁵ It was one of the major factors leading to its conclusion that there existed “highly relevant reasons justifying Ireland's prohibition of broadcast religious advertisements”.⁸⁶

However, the courts in the United Kingdom are not permitted to take into account the paucity of reasoning or debate on a Bill in Parliament as a factor affecting the proportionality of resulting legislation. As Lord Nicholls stated in *Wilson v First County Trust Ltd (No.2)* :

“The proportionality of legislation ... is *not to be judged by the quality of reasons advanced in support of it in the course of parliamentary debate*. Lack of cogent justification in the course of parliamentary debate is not a matter which ‘counts against’ the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament.”⁸⁷

Nevertheless, it must be noted that there is a certain tension on this point with the jurisprudence of the European Court of Human Rights. For example, in *Hirst v UK (No.2)*, one of the reasons why the Grand Chamber found that the blanket ban on the right of convicted prisoners to vote was in breach of art.3 of Protocol No.1, was that Parliament had never “sought to weigh the competing interests or to assess the proportionality of [the] *P.L. 106 ... ban”.⁸⁸ Given the absence of real debate on the blanket ban on political broadcast advertisements--essentially Parliament simply accepted the Government's assurance that it had considered alternatives and that they were unworkable--it may be that if the matter ever comes before the European Court, this would indeed “count against” it on the issue of proportionality.⁸⁹

The whole concept of judicial deference has been the subject of intense academic criticism. Some

have argued that it should have no place *at all* in human rights adjudication given the scheme introduced by the HRA which scrupulously preserves the ability of Parliament to pass incompatible laws if it so desires.⁹⁰ Whatever view is taken on this debate generally, it is submitted that there are flaws with the reasons advanced by Lord Bingham for affording great weight to Parliament's judgment in the particular context of the ban on political broadcast advertising.

Their Lordships' Parthian shots

Despite finding for the Government and refusing ADI's application for a declaration of incompatibility, their Lordships nevertheless let fly several Parthian shots at ss.319 and 321.⁹¹ Thus, despite the apparently bleak prognosis for those wishing to engage in advocacy advertising on television and radio, there are some scraps of comfort that a potential future challenger might draw from the judgment.

Lord Bingham, noting that the pro-vegetarian advertisements in *VgT* had been in *response* to commercial campaigns by the meat industry, said that:

"If ... a body ... had grounds for wishing to *counter the effect of commercial advertising bearing on an issue of public controversy*, it would have strong grounds for seeking to put its case in the ordinary course of broadcast programmes. The broadcaster, discharging his duty of impartiality, could not ignore such a request."⁹²

In the same vein, Lord Scott stated that the dismissal of ADI's appeal should not be taken as "franking sections 319 and 321 against any possible attack on Art.10 grounds".⁹³ He noted that a "good deal of commercial advertising [was] likely to be objectionable to the principles of some section of the viewing public", and he gave a number of examples to this effect. Thus advertisements for zoos or circuses might offend ADI and its supporters; adverts for burgers might offend those groups who disagree with the way the beef cattle are reared **P.L. 107* and slaughtered; and adverts for Christmas turkeys might offend those who oppose the factory farming of poultry. Moreover, he commented:

"Why should these organisations not counter the broadcasting of advertisements that offend their principles with the broadcasting of their own advertisements promoting their principles? It was not suggested that the purpose of ADI's 'My Mate's a Primate' campaign was to counter the broadcasting of advertisements promoting a zoo or zoos in which primates were kept in cages but if that had been the case the arguments justifying the statutory prohibition might have been difficult."⁹⁴

Lord Scott also noted that the width of the statutory prohibition was "remarkable"--and that it appeared to withhold from any organisation whose objects were, "wholly or mainly to bring about changes in the law, the ability to place for broadcasting advertisements with no political content whatever ... or an advertisement with an entirely neutral political content ...".

Even Baroness Hale, whose speech is perhaps the most unequivocal in favour of the prohibition,⁹⁵ acknowledged that the issue was whether the ban "as it applie[d] to these facts [was] proportionate", but that there "may be room for argument" had they been different.⁹⁶

These obiter dicta make clear that a possible future challenger--for example, one claiming the right to respond to a particular advertising campaign--might well secure a declaration of incompatibility.⁹⁷ However, whilst providing a ray of hope for future challengers, from a free speech point of view these dicta seem to cast as much shadow as they do light.

A right to respond?

It has frequently been stated that art.10 does not confer a right of access to broadcasting facilities. In *ProLife Alliance*, Lord Hoffmann stated that there was "no human right to use a television channel"⁹⁸ and the (now defunct) European Commission of Human Rights took the view that art.10 could "not **P.L. 108* be taken as including a general and unfettered right for any private citizen or organisation to have access to broadcasting time ... in order to forward its opinion".⁹⁹ However, the implication in Lord Bingham's and Lord Scott's speeches is that if an organisation wishes to *respond* to an advertising campaign in the broadcast media, then it may indeed be able to claim an enforceable right of access to broadcasting facilities.

One example of how this could play out is in relation to the current debate over climate change. Environmental issues, once considered to be peripheral, are now located at the centre of the party political agenda.¹⁰⁰ Either because of genuine concern over the perils of global warming, or because

of a perception that “playing the green card” will go down well with increasingly environmentally aware voters, political capital is now frequently made by main-stream politicians proclaiming green policies.¹⁰¹

Commercial organisations have not been slow to jump aboard this (carbon neutral) bandwagon and produce a spate of television commercials that claim green credentials for their products.¹⁰² An environmental NGO might wish to counter such green claims by broadcasting its own advertisement explaining that, whilst such products may be less damaging than their nongreen alternatives, they are nevertheless more damaging to the environment than not consuming at all.¹⁰³ Such a group would, according to their Lordships, have a strong case even if the organisation or the advert’s content fell within the definitions set out in s.321.

One might wonder, however, why this new “right of response” should be restricted to such narrow, “rebuttal” type situations. There is a strong argument that the entire edifice of commercial advertising--persuading as it does millions of people literally to “buy into” a certain version of unbridled free market consumerism--is, in a very real sense, “political”. Jonathan Porritt has referred to consumerism as “our pastime, our zeitgeist, our ideology *P.L. 109 all rolled into one”¹⁰⁴ ; a “big idea ... more powerful than any cause or even religion, [reaching] into every corner of the globe”.¹⁰⁵ It is difficult to see why, in response to this all pervasive ideological onslaught, a *generalised* anti-consumerism message--“stop shopping”--should not be permitted on television screens.

One might go further still. If an organisation has the right of access to broadcast facilities in order to *counter* the message of commercial organisations with which it disagrees, why should it not be permitted to *initiate* such a discourse? Why should such a group have to bide its time and wait until its opponents throw the first punch? Why can't it, to coin a phrase, “get its retaliation in first”? If, to take one of Lord Scott's examples, an organisation opposes factory farming on the grounds of cruelty to animals, why must it wait for the producers of factory farmed meat to advertise their product in order to be able to respond using the same powerful medium? The adverts which trigger its right of response will, presumably, lead to an increase in sales of the factory farmed brand in question, thereby fostering the increases in the very animal cruelty that the campaign group opposes.

In addition to the above, Lord Bingham proposed one further scenario in which an issue of compatibility over the ban may arise--if an advertisement were rejected as “political” when it did not fall within s.321(3)(a)-(e) or (g)¹⁰⁶ but *solely* within s.321(3)(f): “influencing public opinion on a matter which, in the UK, is a matter of public controversy”. In such a case, Lord Bingham considered that “there might well be scope for resort to section 3” of the HRA, which would require that, as far as possible, the provision be read and given effect in a way that was compatible with art.10.

This potentially opens the door for a whole range of advocacy advertising on important issues, notwithstanding the fact that they are classified as “political” according to the terms of the statutory definition itself (s.321(3)(f)), and even if they are not seeking to “counter” the effects of a particular commercial campaign. If, for example, a group similar to ADI did not aim specifically to “achieve changes in the law and public policy”,¹⁰⁷ but merely sought to influence public opinion on a controversial matter, its advert should, on this basis, be permitted.

However, the hiving off of this single statutory category as being susceptible to potential art.10 challenge is difficult to sustain. If a matter is of genuine public controversy it is scarcely conceivable that it can be insulated from the worlds of law and politics. Such issues are constantly taken up as causes by individual politicians in response to the views of their constituents, or by political parties in response to shifts in public opinion. Frequently these engagements result *P.L. 110 in the adoption of new policies and/or proposals for legislation, thus bringing the subject-matter of the original advert within the ambit of one or more of the other statutory categories (s.321(3)(a)-(e) or (g)). Are we to say that an advert *purely* on a matter of public controversy (i.e. one falling solely within s.321(3)(f)) will be permitted in order to influence public opinion--but that if it *succeeds* (with the result that a politician or political party takes it up as a campaign or policy, thereby causing it to overflow into the other statutory categories), it will, at that point and for that reason, be banned?¹⁰⁸

Conclusion

At this point in the analysis we founder upon a paradox lurking like a hidden boulder beneath the calm surface of the House of Lords' overall approach. It will be recalled that the outcome of ADI hinged upon judicial deference to Parliament's view that it was not possible to devise an alternative scheme that was workable. Hence the continued need for the blanket ban. Their Lordships accepted

Parliament's view that this area was not amenable to implementing a more nuanced scheme that would take account of individual cases; that this was an issue which demanded a bright line rule. What is more, and perhaps most crucially, Parliament, with its greater institutional competence and democratic legitimacy, was in the best position to make this judgment, which should accordingly be given "great weight".

But the Parthian arrows that their Lordships released brought this shibboleth crashing down. Having given great weight to Parliament's judgment that this matter was not amenable to an approach that took account of individual cases, *with the very next breath* the court hypothesised individual cases with slightly altered factual matrices that *would* be likely to result in breaches of art.10. Their Lordships thereby reintroduced the very discretion, uncertainty, and scope for challenge that the wide blanket ban was designed to preclude.¹⁰⁹

It is as if the House of Lords could not wholly commit itself to the emasculated conception of its role that the ratio of the case would seem to demand. On the substantive question--of where the appropriate balance between freedom of political expression and equality of political opportunity should be struck--it could not quite bring itself to forsake freedom of expression and to put all its chips in the equality side of the scales. Having showed obeisance to the sovereignty of Parliament, it nevertheless refused to "abdicate [its] responsibility" as the "guardian of human rights".¹¹⁰ The tension between its **P.L. 111* traditional role as dutiful servant doing Parliament's bidding and its newfound role under the 1998 Act is palpable. Having apparently been in full-on retreat it could not resist swivelling in the saddle and letting fly; and several of those barbed arrows hit their mark. The ban on political broadcast advertising that the Government had been so insistent was necessary in its all embracing form is now, it is submitted, severely wounded.

To return to the underlying procedural question--what is the appropriate role of the court when called upon to review the devices of democracy? The impression given by their Lordships in this case is that they are unable to make up their minds. This ambivalence explains their initial posture of deference to Parliament's judgment and subsequent adumbration of exceptions which successfully undermine the results of that very posture. It is submitted that, rather than getting itself into this doctrinal pickle, it would have been preferable for the House of Lords to have used the scheme set up by Parliament itself, in the Human Rights Act, and made a declaration of incompatibility. The matter would then have passed back to the democratically accountable forums for consideration. As it stands, however, uncertainty is rife--paradoxically the very situation the Government and Parliament scrupulously sought to avoid by enacting the blanket ban in the first place.

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1. See, e.g. *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737 ECtHR at [49]; *Castells v Spain* (1992) 14 E.H.R.R. 445 ECtHR at [42]; *Kuli# v Poland* (App. No.15601/02), judgment of March 18, 2008 ECtHR at [36]; *Incal v Turkey* (2000) 29 E.H.R.R. 449 ECtHR at [46].
 2. See, e.g. *Lingens v Austria* (1986) 8 E.H.R.R. 407 ECtHR at [42]; *Moscow Branch of the Salvation Army v Russia* (2006) 44 E.H.R.R. 46 ECtHR at [60]. See A. Mowbray, "The Role of the European Court of Human Rights in the Promotion of Democracy" [1999] P.L. 703.
 3. On the philosophical justifications for the free speech right generally see E. Barendt, *Freedom of Speech* (Oxford: OUP, 2005), Ch.1; F. Schauer, *Free speech: a philosophical enquiry* (Cambridge: CUP, 1982). Other justifications include the pursuit of truth, individual self-fulfilment and autonomy.
 4. The Preamble to the Convention stresses the interconnectedness of political democracy and human rights protection; and limitations on various Convention rights may only be to the extent that is "necessary in a democratic society".
 5. *United Communist Party of Turkey v Turkey* (1998) 26 E.H.R.R. 121 ECtHR at [45].
 6. *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115 HL at 126.
 7. See *Refah Partisi (Welfare Party) v Turkey* (2003) 37 E.H.R.R. 1 ECtHR; *United Communist Party of Turkey* (1998) 26 E.H.R.R. 121 ECtHR; I. Cram "Constitutional Responses to extremist political associations--E.T.A., Batasuna and Democratic Norms" (2008) 28 L.S. 68.
 8. For a consideration of these issues from the viewpoint of restrictions on political funding see J. Marriott, "Alarmist or Relaxed? Election

Expenditure Limits and Free Speech" [2005] P.L. 764. In *R. (on the application of the ProLife Alliance) v BBC* [2003] UKHL 23; [2003] 1 A.C. 185 Lord Walker noted the "paradox" that "on the one hand, political discussion or debate is, of all forms of communication protected by Art.10, accorded particular importance ... But on the other hand, there may be good democratic reasons for imposing special restrictions, especially to prevent those with the deepest pockets from exercising too much influence through the most powerful and intrusive means of communication" (at [130]).

9. C. Sunstein, "Political Equality and Unintended Consequences" (1994) 94 *Columbia Law Review* 1390, 1392.
10. *Buckley v Valeo* 424 U.S. 1 (1976).
11. *Buckley* 424 U.S. 1 (1976) at 48-49 (per curiam opinion).
12. *Buckley* 424 U.S. 1 (1976) at 49-50 (per curiam opinion). See Marriott, "Alarmist or Relaxed?" [2005] P.L. 764; Sunstein, "Political Equality" (1994) 94 *Columbia Law Review* 1390; J. Skelly Wright, "Politics and the Constitution: Is Money Speech?" (1976) 85 *Yale Law Journal* 1001.
13. *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 2 W.L.R. 781. See N. McCormick, "Political Expression: *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport*" (2008) 19 Ent. L.R. 147.
14. See, e.g. Broadcasting Act 1990 s.92. See *R. v Radio Authority Ex p. Bull* [1998] Q.B. 294 CA (Civ Div); J. Stevens and D. Feldman, "Broadcasting advertisements by bodies with political objectives, judicial review and the influence of charities law" [1997] P.L. 615.
15. Communications Act 2003 s.319(2)(g). Section 333 retains the previous regime which applied to Party Political Broadcasts, time for which is allocated free of charge to the major political parties, *ProLife Alliance* [2003] UKHL 23; [2003] 1 A.C. 185 at [34].
16. Communications Act 2003 s.321(2)(a).
17. Communications Act 2003 s.321(2)(b).
18. Communications Act 2003 s.321(3)(a). Applies in the UK or elsewhere.
19. Communications Act 2003 s.321(3)(b). Applies in the UK or elsewhere.
20. Communications Act 2003 s.321(3)(c). Applies to local, regional and national governments in the UK or elsewhere.
21. Communications Act 2003 s.321(3)(d). Applies to the law of the UK or of a country or territory outside the UK.
22. Communications Act 2003 s.321(3)(e).
23. Communications Act 2003 s.321(3)(f).
24. Communications Act 2003 s.321(3)(g).
25. *Hansard*, HC Vol.395, col.788 (December 3, 2002). The Committee on Standards in Public Life (The Neill Committee). *Fifth Report, The Funding of Political Parties in the United Kingdom*. 1998. Cm.4057-1, p.176, recommendation 94, recommended that the ban be retained for these reasons. For qualified academic support for the ban see J. Rowbottom, "The ban on political advertising and Article 10" (2007) 18 Ent. L.R. 91, 95.
26. For a critique of the substantive arguments frequently used to justify the ban see A. Scott, "'A Monstrous and Unjustifiable Infringement?': Political Expression and the Broadcasting Ban on Advocacy Advertising" (2003) 66 M.L.R. 224. See also A. Geddis, "If Thy Right Eye Offend Thee, Pluck it Out" (2003) 66 M.L.R. 885, 891-893; C. Munro, "Time up for the Ban" (2007) 157 N.L.J. 886. For a recent example consider the *Make Poverty History* campaign whose "One Click" advert was held to infringe the ban. See Ofcom bulletin issue 43, September 12, 2005, pp.4-14 available at http://www.ofcom.org.uk/tv/obb/prog_cb/pcb52/issue43a.pdf [Accessed November 24, 2008]. See H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006), pp.1018-1020.
27. See, e.g. *Handyside* (1976) 1 E.H.R.R. 737 ECtHR at [49]; *Castells v Spain* (1992) 14 E.H.R.R. 445 ECtHR at [42]; *Kuli# v Poland* (App. No.15601/02), judgment of March 18, 2008 ECtHR at [36]; *Incal v Turkey* (2000) 29 E.H.R.R. 449 ECtHR at [46].
28. *VgT Verein gegen Tierfabriken v Switzerland* (2002) 34 E.H.R.R. 4 ECtHR.

29. *VgT* (2002) 34 E.H.R.R. 4 ECtHR at [72].
30. Federal Radio and Television Act s.18(5).
31. *VgT* (2002) 34 E.H.R.R. 4 ECtHR at [73].
32. *VgT* (2002) 34 E.H.R.R. 4 ECtHR at [75].
33. *VgT* (2002) 34 E.H.R.R. 4 ECtHR at [75].
34. *VgT* (2002) 34 E.H.R.R. 4 ECtHR at [71]. Subsequent to this judgement *VgT* applied again to the Swiss Federal Court to have the ban on its advertisement lifted. The Swiss court again declined. The European Court found there to be a further breach of art.10 in *VgT Verein gegen Tierfabriken v Switzerland* (App. No.32772/02), judgment of October 4, 2007. The case was heard by the Grand Chamber on July 9, 2008--judgment pending. For a recent and strong reaffirmation of the Court's approach in *VgT* see *TV Vest As & Rogaland Pensjonistparti v Norway* (App. No.21132/05), judgment of December 11, 2008 ECtHR.
35. (2004) 38 E.H.R.R. 182 ECtHR at [67]. See A. Geddis, "You Can't say God on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after *Murphy v Ireland*" [2004] E.H.R.L.R. 182.
36. By the Broadcasting Advertising Clearance Centre, an informal body funded by commercial broadcasters to monitor proposed advertisements.
37. Throughout all the stages in the litigation it was agreed by the parties that the terms of the statutory prohibition were too clear to be circumvented using the power of interpretation under s.3 of the HRA.
38. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [9] (Lord Bingham).
39. *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2006] EWHC 3069; [2007] E.M.L.R. 6. See J. Rowbottom, "The ban on political advertising and Article 10" (2007) 18 Ent. L.R. 91; C. Munro "Time up for the Ban" (2007) 157 N.L.J. 886.
40. Lord Bingham, Lord Scott and Baroness Hale gave fully reasoned speeches. Lord Carswell and Lord Neuberger agreed with the reasons given by Lord Bingham.
41. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [27] (Lord Bingham).
42. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [28] (Lord Bingham).
43. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [28] (Lord Bingham). See also Lord Scott at [40] and Baroness Hale at [49].
44. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [31] (Lord Bingham). Furthermore, counsel for the appellant, Michael Fordham Q.C., did not pursue the arguments about alternative schemes, according to Lord Bingham "advisedly" so, although they had been advanced before the Divisional Court.
45. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [32] (Lord Bingham). His Lordship did not mention the internet. In *VgT* (2002) 34 E.H.R.R. 4 ECtHR the Second Section of the Court had held that a ban that applied to certain media and not others did not appear to have objectives of a particularly pressing nature, at [74]. By contrast in *Murphy* (2004) 38 E.H.R.R. 182 ECtHR the Third Section of the Court had held that such differential treatment was justified by the fact that the broadcast media had "a more immediate, invasive and powerful impact including ... on the passive recipient" (at [74]).
46. *Bowman v United Kingdom* (1998) 26 E.H.R.R. 1 ECtHR. See C. Gearty, "Democracy and Human Rights in the European Court of Human Rights: a critical appraisal" (2000) 51 N.I.L.Q. 381.
47. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [30] (Lord Bingham), quoting Ouseley J. in the Divisional Court *ADI* [2006] EWHC 3069; [2007] E.M.L.R. 6 at [90].
48. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [28]-[29] (Lord Bingham). There was disagreement between, on the one side, Lord Bingham at [37] and Baroness Hale at [53] who said that domestic courts had to follow, in the absence of special circumstances, the jurisprudence of the European Court which had the ultimate interpretative authority for Convention rights and on the other side, Lord Scott at [44], who saw the possibility of separate streams of interpretation--one domestic and one European. See further J. Lewis, "The European Ceiling on Human Rights" [2007] P.L. 720; R. Masterman, "Aspiration or foundation? The status of Strasbourg jurisprudence and the 'Convention rights' in domestic law" in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act*

(Cambridge: CUP, 2007), p.57.

49. ADI [2008] UKHL 15; [2008] 2 W.L.R. 781 at [43] (Lord Scott).
50. *VgT* (2002) 34 E.H.R.R. 4 ECtHR at [70]-[71]. The Court noted that "it [could] not be denied that in many European societies there was, and is, an ongoing general debate on the protection of animals and the manner in which they are reared".
51. ADI [2008] UKHL 15; [2008] 2 W.L.R. 781 at [33] (Lord Bingham), [40] (Lord Scott) and [52] (Baroness Hale). The use of the actual term "deference" is noticeable by its absence, perhaps because of its "overtones of servility or, perhaps gracious concession": *ProLife Alliance* [2003] UKHL 23; [2004] 1 A.C. 185 at [75] (Lord Hoffmann). The term was disapproved of in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167 at [16] (Lord Bingham, giving joint opinion of the Committee).
52. ADI [2008] UKHL 15; [2008] 2 W.L.R. 781 at [35] (Lord Bingham).
53. ADI [2008] UKHL 15; [2008] 2 W.L.R. 781 at [26] (Lord Bingham).
54. F. Schauer, "Judicial Review and the Devices of Democracy" (1994) 94 *Columbia Law Review* 1326, 1334.
55. *ProLife Alliance* [2003] UKHL 23; [2004] 1 A.C. 185. Lord Nicholls, Lord Hoffmann and Lord Walker gave full speeches, finding for the BBC. Lord Millett agreed with Lord Nicholls. Lord Scott dissented.
56. In respect of independent broadcasters these were imposed by the Broadcasting Act 1990 s.6(1)(a)--and in respect of the BBC, by virtue of para.5.1(d) of its agreement with the Secretary of State of National Heritage. Lord Walker referred to the BBC guidelines as "quasi-statutory" at [139]. See H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006), pp.586-587
57. *R. (on the application of ProLife Alliance) v BBC* [2002] EWCA Civ 297; [2002] 3 W.L.R. 1080 at [1] (Laws L.J.). For a critical account of the Court of Appeal's decision see A. Geddis, "What future for political advertising on the UK's television screens?" [2003] P.L. 615.
58. *ProLife Alliance* [2002] EWCA Civ 297; [2002] 3 W.L.R. 1080 at [37] (Laws L.J.) and [57] (Simon Brown L.J.).
59. *ProLife Alliance* [2003] UKHL 23; [2004] 1 A.C. 185 at [72] (Lord Hoffmann). For comment, both critical and favourable, see E. Barendt, "Free speech and abortion" [2003] P.L. 580; J. Jowell, "Judicial deference: servility, civility or institutional capacity" [2003] P.L. 592; I. Hare, "Debating abortion--the right to offend gratuitously" (2003) 62 C.L.J. 525; Geddis, "If Thy Right Eye Offend Thee, Pluck it Out" (2003) 66 M.L.R. 885.
60. *ProLife Alliance* [2003] UKHL 23; [2004] 1 A.C. 185 at [80] (Lord Hoffmann).
61. *ProLife Alliance* [2003] UKHL 23; [2004] 1 A.C. 185 at [16] (Lord Nicholls). See Geddis, "If Thy Right Eye Offend Thee, Pluck it Out" (2003) 66 M.L.R. 885, 890-891.
62. ADI [2008] UKHL 15; [2008] 2 W.L.R. 781 at [33] (Lord Bingham).
63. S. Fredman, "From deference to democracy: the role of equality under the Human Rights Act 1998" (2006) 122 L.Q.R. 53, 56. See also, e.g. R. Edwards, "Judicial Deference under the Human Rights Act" (2002) 65 M.L.R. 859; and Laws L.J. in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] Q.B. 728 at [83]-[87]. Doubt has been cast on the appropriateness of affording weight to primary decision makers solely because they are accountable to an electorate. For a useful summary of the authorities see T. Hickman, "The substance and structure of proportionality" [2008] P.L. 694, fn.14.
64. S. Fredman, "From deference to democracy: the role of equality under the Human Rights Act 1998" (2006) 122 L.Q.R. 53, 56.
65. See Schauer, "Judicial Review and the Devices of Democracy" (1994) 94 *Columbia Law Review* 1326, 1335-1336.
66. Schauer, "Judicial Review and the Devices of Democracy" (1994) 94 *Columbia Law Review* 1326, 1336.
67. Under the Political Parties, Elections and Referendums Act 2000 ss.37 and 127, broadcasters may only transmit party political broadcasts on behalf of registered political parties (the largest of which dominate Parliament), and referendum campaign broadcasts on behalf of designated organisations. Airtime for these is provided free of charge. The major political parties therefore, it is arguable, have an interest in maintaining the status quo. See Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (2006), p.1014; Lord Hoffmann in *ProLife Alliance* [2003] UKHL 23; [2004] 1 A.C. 185 at [33]-[36].
68. ADI [2008] UKHL 15; [2008] 2 W.L.R. 781 at [33] (Lord Bingham). His Lordship's assertion that a s.19(1)(b) statement is indicative of the

executive view that it “may possibly though improbably” infringe art.10 does not seem to be quite consonant with guidance given to ministers and departments at the time: that for a s.19(1)(a) statement to be made it must be “more likely than not that the provisions ... will stand up to challenge on Convention grounds”: Lord Chancellor’s Department, *Human Rights Act 1998 Guidance for Departments*, 2nd edn (2000), para.36. This document is no longer available. The current *Guide to Legislative Procedures* (Cabinet Office, October 2004) contains no such advice. See D. Feldman, “The impact of human rights on the UK legislative process” (2004) 25 Stat. L.R. 91, 98; and “Institutional Roles and the Meanings of ‘Compatibility’” in Fenwick, Phillipson and Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (2007), pp.99-100.

- [69.](#) J. Heibert, “Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?” (2006) I.J.C.L. 1, 12. See *Hansard*, HC Vol.325, col.780 (February 16, 1998) (Jack Straw MP, Home Secretary); *Hansard*, HL Vol.575, col.1233 (November 3, 1997) (Lord Irvine of Lairg, Lord Chancellor).
- [70.](#) *R. v A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45 at [69] (emphasis added). See A. Kavanagh, “*Pepper v Hart* and Matters of Constitutional Principle” (2005) 121 L.Q.R. 98, 119-20, and “The role of parliamentary intention in adjudication under the Human Rights Act 1998” (2006) 26 O.J.L.S. 179, fn.64.
- [71.](#) As has arguably happened as a result of *Pepper v Hart* [1993] A.C. 593 HL; see, e.g. Lord Steyn, “*Pepper v Hart* : a re-examination” (2001) 21 O.J.L.S. 59; A. Kavanagh, “*Pepper v Hart* and Matters of Constitutional Principle” (2005) 121 L.Q.R. 98.
- [72.](#) The contrasting use of these terms is discussed in fn.68 above.
- [73.](#) See text accompanying fn.70 above.
- [74.](#) *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [33] (Lord Bingham). His Lordship cited several cases as authorities for this proposition: *James v United Kingdom* (1986) 8 E.H.R.R. 123 ECtHR at [68]; *Mallacher v Austria* (1989) 12 E.H.R.R. 391 ECtHR at [52]-[53]; *R. (on the application of Pretty) v DPP* [2001] UKHL 61, [2002] 1 A.C. 800 at [29]; *Wilson v First County Trust (No.2)* [2003] UKHL 40, [2004] 1 A.C. 816 at [72]-[4]; *R. (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 A.C. 73 at [41] and [91].
- [75.](#) H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford: OUP, 1994), p.130. See further P. Sales and B. Hooper, “Proportionality and the Form of Law” (2003) 119 L.Q.R. 426; T. Lewis, “Rights Lost in Translation? Fact-insensitive Laws, the Human Rights Act and the UK’s Ban on Broadcast Political Advertising” [2007] E.H.R.L.R. 663.
- [76.](#) See, e.g. *VgT Verein gegen Tierfabriken v Switzerland* (2002) 34 E.H.R.R. 4 ECtHR; *R. (on the application of Baijai) v Secretary of State for the Home Department* [2008] UKHL 53; [2008] 3 W.L.R. 549 (blanket presumption that any marriage involving a person with less than six months’ leave to remain in the UK was a sham); *Hirst v UK (No.2)* (2006) 42 E.H.R.R. 41 ECtHR (blanket ban on convicted prisoner voting); *Bowman v UK* (1998) 26 E.H.R.R. 1 ECtHR (rigid £5 limit on third party expenditure during elections); *Tinnelly & Sons Ltd v UK* (1999) 27 E.H.R.R. 249 ECtHR (issuance of “conclusive evidence” certificates preventing effective access to the courts); *Campbell v UK* (1992) 15 E.H.R.R. 137 ECtHR (opening and reading of all prisoner correspondence including that to lawyers).
- [77.](#) P. Sales and B. Hooper, “Proportionality and the Form of Law” (2003) 119 L.Q.R. 426, 442-450.
- [78.](#) *Nineteenth Report of Session 2001-02*. HL Paper No.149, HC Paper No.1102 (Session 2001/2002), paras 58-64. See also the Committee’s *First Report of Session 2002-03*. HL Paper No.24, HC Paper No.191 (Session 2002/03), para.16. Lord Bingham gave a full account of the history of the passage of the Bill, the reservations expressed and justifications proffered, at [13]-[21].
- [79.](#) *Nineteenth Report of Session 2001-02*, para.64. One example of a workable, more nuanced, alternative to an outright ban can be seen in Canada: see *Harper v Att-Gen (Canada)* [2004] 1 S.C.R. 827.
- [80.](#) Memorandum in Response to Nineteenth Report of the Joint Committee on Human Rights (January 9, 2003) (emphasis added). On the difficulties with alternative schemes see Rowbottom “The ban on political advertising” (2007) 18 Ent. L.R. 91, 95.
- [81.](#) *Fourth Report of Session 2002-03*. HL Paper No.50, HC Paper No.397 (Session 2002/03), para.41.
- [82.](#) *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [13]-[21] (Lord Bingham).
- [83.](#) *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [31] (Lord Bingham).
- [84.](#) *Murphy v Ireland* (2004) 38 E.H.R.R. 182 ECtHR at [28].
- [85.](#) *Murphy v Ireland* (2004) 38 E.H.R.R. 182 ECtHR at [73].
- [86.](#) *Murphy v Ireland* (2004) 38 E.H.R.R. 182 ECtHR at [75].

87. *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40; [2004] 1 A.C. 816 at [61] (Lord Nicholls). His Lordship went on to suggest that the latter would contravene art.9 of the Bill of Rights 1689. See also the speeches of Lord Hope at [116] and Lord Hobhouse at [141].
88. *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41 ECtHR at [79].
89. See T. Lewis, "Difficult and Slippery Terrain": Hansard, Human Rights and *Hirst v UK* [2006] P.L. 209.
90. See, e.g. F. Klug, "Judicial deference under the Human Rights Act 1998" [2003] E.H.R.L.R. 125; R. Edwards, "Judicial deference under the Human Rights Act" (2002) 62 M.L.R. 859; T.R.S. Allan, "Human Rights and Judicial Review: a critique of due deference" (2006) 65 C.L.J. 671.
91. Parthian horse archers perfected the art of turning in the saddle and shooting their arrows to the rear, at pursuing enemies.
92. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [34] (Lord Bingham) (emphasis added).
93. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [41] (Lord Scott).
94. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [41] (Lord Scott).
95. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [47] (Baroness Hale). In her speech Baroness Hale talked of "an elephant in the committee room, always there but never mentioned ... the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America".
96. *ADI* [2008] UKHL 15; [2008] 2 W.L.R. 781 at [52] (Baroness Hale).
97. The Divisional Court ([2006] EWHC 3069; [2007] E.M.L.R. 6) had interpreted its power under s.4 of the HRA in a radically different way to that suggested by their Lordships. It had said that its "concern ... [was] as to the compatibility of the statutory prohibition, not as to a narrower question, namely whether ... a statutory prohibition is justifiable in the particular circumstances of the case": at [30] (Auld L.J.). See also [40] (Auld L.J.). The clear implication of the obiter dicta of the House of Lords is that the approach of the Divisional Court on this question was not correct. Their Lordships clearly envisaged possible future compatibility challenges to the ban based on slightly differing factual matrices. And they clearly envisaged that the legislation might be found to be prima facie incompatible and the court either use its wide powers of interpretation under s.3 or, failing that, make a s.4 declaration in such cases.
98. *ProLife Alliance* [2003] UKHL 23; [2004] 1 A.C. 185 at [57] (Lord Hoffmann). See also the speeches of Lord Nicholls at [8] and Lord Walker at [129]. See also Lord Bingham in *ADI* at [26].
99. See, e.g. *Haider v Austria* (App. No.25060/94), judgment of October 18, 1996 at 66; although in the following sentence the Commission stated that the denial of broadcasting time to a specific group or person may raise issues under art.10 or arts 10 and 14, e.g. if one political party was excluded from broadcasting facilities at election time while other parties were given it.
100. See, generally, D. Richardson and C. Rootes (eds), *The Green Challenge: The Development of Green Parties in Europe* (London: Routledge, 1995).
101. See, e.g. "Cameron pledges to firm up green credentials with carbon levy", *Guardian*, April 21, 2006; "Gordon Brown: 'The environment must be centre of policy worldwide'", *Independent*, April 20, 2006.
102. Examples of campaigns at the time of writing include those for *BMWEfficientDynamics* motor cars, *Ariel 30 Celsius* washing powder, *EDF* energy and *Nouvelle* toilet tissues. At least when misrepresenting or exaggerating green credentials this phenomenon is known as "greenwashing". See "The six sins of greenwashing" at http://www.terrachoice.com/files/6_sins.pdf [Accessed December 4, 2008] and "The Greenwash guide" at http://www.futerra.co.uk/downloads/Greenwash_Guide.pdf [Accessed November 24, 2008].
103. Where green claims are alleged to be misleading they may be subject to adjudication by the Advertising Standards Authority. See, e.g. the adjudication on a television advert for the *Toyota Prius*, June 6, 2007, available at http://www.cap.org.uk/asa/adjudications/Public/TF_ADJ_42615.htm [Accessed November 24, 2008].
104. J. Porritt, "Big Ideas that Changed the World", at <http://www.mymultiplesclerosis.co.uk/big-ideas/consumerism.html> [Accessed November 24, 2008]. See also N. Klein, *No Logo* (London: Flamingo, 2000).
105. "Stop Shopping", *Observer*, April 8, 2007; A. Scott, "'A Monstrous and Unjustifiable Infringement?': Political Expression and the Broadcasting Ban on Advocacy Advertising" (2003) 66 M.L.R. 224, 234.
106. See fnn.16-24 above

107. ADI [2008] UKHL 15; [2008] 2 W.L.R. 781 at [2] (Lord Bingham).
108. This distinction is rendered even more difficult to sustain when a comparison is made with the law regulating charities. As Colin Munro notes, under the Charities Act 2006 charities must be “established for charitable purposes only” (s.1(1)(a)). They are not subject to the broadcast political advertising ban. However, s.2(2) of the Charities Act 2006 defines “charitable purposes” so as to include “the advancement of”, amongst other things, “human rights”, “environmental protection” and “animal welfare” as well as the “prevention of ... poverty”--issues which, in some circumstances at least, clearly come very close to the “political”. See Munro, “Time up for the Ban” (2007) 157 N.L.J. 886.
109. ADI [2008] UKHL 15; [2008] 2 W.L.R. 781 at [31] (Lord Bingham), see text accompanying fn.44 above.
110. Simon Brown L.J. in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] Q.B. 728 at [27].

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