

## **Monkey See, Monkey Do Something About This Law: A Proposal to Reform the Communications Act 2003**

### Introduction

Few people would fail to be moved by the sight of a four-year-old child sitting in a small cage, anxious and afraid. This was certainly the hope of the charity Animal Defenders International (ADI), who in 2005 included this image as part of a television advert designed to encourage viewers to order a £10 information pack about the abuse of chimpanzees.<sup>1</sup> However, this 31-second advert was never broadcast because its objectives were deemed to be 'mainly or wholly of a political nature' and, as a result, contrary to the outright ban – set out in the Communications Act 2003 – on the broadcasting by television and radio of political advertising. ADI is in good company: in the past decade several distinguished charities, including Make Poverty History, Shelter and Amnesty International, have also had adverts banned under the Act.<sup>2</sup> As will be seen below, a strong moral and legal case can be made in support of the ban. However this is not enough to justify such a sweeping interference with freedom of speech. This essay therefore makes the case for a reform that is both socially desirable and legally necessary.

### The Current Law

The law on this issue is, at least ostensibly fairly clear. Section 319(2)(g) of the Communications Act 2003 makes it the responsibility of the media regulator OFCOM to prevent the broadcasting by television or radio of the following:

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<sup>1</sup> *My Mate's a Primate*, [http://www.youtube.com/watch?v=qON\\_lFQE4HY](http://www.youtube.com/watch?v=qON_lFQE4HY) [accessed 17 September 2014].

<sup>2</sup> 'How Charities Fall Foul of the TV Ad Rules' (18 September 2014), *Third Sector*, <http://www.thirdsector.co.uk/charities-fall-foul-tv-ad-rules/communications/article/1309021> [accessed 21 September 2014]; see also: *R. (on the application of London Christian Radio Ltd) v Radio Advertising Clearance Centre* (2013), 1 W.L.R. 307.

S321(1)

- (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
- (b) an advertisement which is directed towards a political end; or
- (c) an advertisement which has a connection with an industrial dispute.

The definition of 'political nature' and 'political ends', outlined in s321(3), is broad. It ranges from seeking to influence the outcome of elections or bring about changes in the law, to the 'influencing of public opinion on a matter which, in the UK, is a matter of public controversy.' These adverts are distinguished from what s333 describes as 'party political broadcasts', which contain televised pledges from political parties and will be familiar to anyone who has switched on their television during an election campaign. The length, frequency and availability of these broadcasts are strictly controlled by rules set by OFCOM.<sup>3</sup>

The Act was passed after what the European Court of Human Rights (ECtHR) has described as 'exceptional examination by parliamentary bodies' of the 'cultural, political and legal aspects of the prohibition'.<sup>4</sup> In the course of this examination the government outlined several key justifications in support of their proposal, which were also broadly endorsed by parliament. They stated that a ban was necessary to deny powerful interests the opportunity to skew political debate by buying advertising spots and to avoid the public being overwhelmed by political propaganda.<sup>5</sup> The UK courts have generally accepted this reasoning, as can be seen in the passage of the ADI case through High Court

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<sup>3</sup> 'Ofcom rules on Party Political and Referendum Broadcasts' (21 March 2013). Available from: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/ppbrules/> [accessed 17 September 2014].

<sup>4</sup> *Animal Defenders International v The United Kingdom* (No. 48876/08) ECHR [2013], para. 114.

<sup>5</sup> HC Deb (2002-3) 395, col. 788. Available from: <http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo021203/debtext/21203-14.htm> [accessed 17 September 2014].

and House of Lords. For instance, in relation to the necessity of the ban, Hale LJ stated 'we do not want our government or its policies to be decided by the highest spenders'.<sup>6</sup> Finally, in 2014, the ECtHR gave its seal of approval to the legislation and to the government's reasoning, albeit by the narrowest of margins.<sup>7</sup>

### Free Speech and the Case for Reform

Nevertheless, there are compelling reasons for change. The total ban imposed by the Communications Act has denied ADI and many organisations like it opportunities to impart their views on matters of public interest to a significant proportion of the UK population, who have themselves been denied the opportunity to hear them. This has been described by one academic as a 'monstrous and unjustifiable interference with freedom of expression'.<sup>8</sup> Indeed, such a broad restriction is difficult to reconcile with any serious free speech theory. John Stuart Mill, one of the most influential writers on this topic, was clear that truth and progress relied on a person's ability to compare competing ideas with one another, and that any restriction on the dissemination of these ideas would be unacceptable.<sup>9</sup> Another highly influential theory posits that the free and open communication of ideas is essential to enable choice and participation in a democracy.<sup>10</sup> Taking a slightly different line, other theorists have stressed that the ability to express oneself freely is integral to a person's identity and self-fulfilment.<sup>11</sup>

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<sup>6</sup> *R (On the Application of Animal Defenders International) v The Secretary of State for Culture Media and Sport* (2008), 2 W.L.R. 781, para. 48. See also: *R (On the Application of Animal Defenders International) v The Secretary of State for Culture Media and Sport* (2007), H.R.L.R. 9

<sup>7</sup> *ADI v UK*, para 112.

<sup>8</sup> Joint Committee on the draft Communications Bill, *Minutes of Evidence* (HC 2002-3), para 479. Available from:

<http://www.publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/2061709.htm> [accessed 21 September 2014].

<sup>9</sup> John Stuart Mill (1989), *'On Liberty' and Other Writings* (Cambridge, Cambridge University Press), ch. 2.

<sup>10</sup> E.M. Barendt (2007), *Freedom of Speech* (Oxford, Oxford University Press), p. 20.

<sup>11</sup> *Ibid.*, pp. 17-8.

Surely our society, culture and politics would be greatly enriched if people were confronted more regularly by views and opinions on matters of public interest, even if they do not agree with them? More injustice would be exposed. People would be able to make more informed decisions about controversial matters such as abortion, animal rights and discrimination. People would be more engaged with the democratic process and charities would be able to raise greater funds and awareness.

It is also clear that the ban, as it currently stands, appears unfair. After all, comparatively few restrictions are placed upon the broadcasting of adverts for commercial products, even though these too could be argued to contain 'political' messages. Several dissenting judges in the *ADI* case have taken up this point, suggesting that advertisements for circuses, cosmetics or meat products could be offensive to animal rights campaigners and interpreted as advocating the reckless exploitation of animals for human profit.<sup>12</sup> Going further, two commentators have suggested that on some level almost all commercial advertising could be seen as 'political' because it encourages viewers and listeners to 'buy in' to free-market, consumerist ideas.<sup>13</sup> In addition, under the current law, the rights of groups like ADI to broadcast adverts also compare unfavourably with those of established political parties, who are allotted party political broadcasts.<sup>14</sup>

### The legal case for reform

There is also a strong legal case for reform. The recent ruling in *ADI* is surprising in many ways, and this matter appears far from settled. In general the recent trend in Europe – as the ECtHR has itself acknowledged – is to move away from broad prohibitions on political

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<sup>12</sup> *R(ADI) v SoS DCMS* (2008), 2 W.L.R. 781, para. 41; *ADI v UK*, para. 19 (dissenting judgments II).

<sup>13</sup> Tom Lewis and Peter Crumper, (2009) 'Balancing freedom of political expression against equality of political opportunity: the courts and the UK's broadcasting ban on political advertising', January, *Public Law*, p. 108.

<sup>14</sup> *ADI v UK*, para 89.

advertising.<sup>15</sup> Much of this has come as a response to the strong protection which the ECtHR has afforded to speech of a political nature. In *Lingens v Austria* the ECtHR famously stated that:

Freedom of expression...constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.<sup>16</sup>

This mantra has been repeated in a number of ECtHR cases relating to Article 10, including *ADI*. Furthermore, the ECtHR has emphasised the particular importance of political speech, stressing that 'freedom of political debate' lies 'at the very core of the concept of a democratic society, which prevails throughout the Convention'.<sup>17</sup> This type of speech has been broadly defined, much like in the Communications Act: it encompasses matters of general public interest, such as allegations of mistreatment by police officers and scientific opinion about the potential dangers of cooking in microwaves.<sup>18</sup> The ECtHR has also readily acknowledged that this category would include the message being promoted by ADI, stating in that very case that 'there is little scope under Article 10(2) for restrictions on debates on questions of public interest'.<sup>19</sup>

Indeed, on two occasions prior to its ruling in *ADI*, the ECtHR found that blanket bans on the broadcasting of political advertising were a *violation* of Article 10. In *VgT v Switzerland* the Court upheld the right of VgT, an animal rights organization, to broadcast an advert highlighting the suffering of animals bred for consumption and exhorting

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<sup>15</sup> *Ibid.*, para 123.

<sup>16</sup> *Lingens v Austria* (No. 9815/82) ECHR [1986], para. 41.

<sup>17</sup> *Ibid.*, para. 42.

<sup>18</sup> D. Feldman (2002), *Civil Liberties and Human Rights in England and Wales, 2<sup>nd</sup>edn.* (Oxford, Oxford University Press), p. 759; *Thorgeir Thorgierson v Iceland* (No. 13778/88) ECHR [1992]; *Hertel v Switzerland* (No. 59/1997/843/1049) ECHR [1998].

<sup>19</sup> *ADI v UK*, para. 102.

viewers to 'eat less meat'.<sup>20</sup> This was broadcast in response to a campaign run by the meat industry and the Court ruled that, whilst Switzerland's ban on political advertising was designed to 'prevent financially powerful groups from obtaining a competitive political advantage', it was disproportionate to prevent a poorly resourced group with no intention of distorting the political process from broadcasting their views. Similar reasoning was applied to the second case, *TV Vest v Norway*, in which a fine imposed on a broadcaster for broadcasting an advert for a minority political party was found to be a further violation of Article 10.<sup>21</sup>

Understandably, these judgments loomed heavily in ADI's submissions to the ECtHR.<sup>22</sup> However, instead of following its previous reasoning the Court surprised many observers by deciding to approach the UK ban as a 'general measure' enabling it to stress the importance of the legislative process and reasons for the ban over the hardship caused in individual cases.<sup>23</sup> This has raised a number of issues. Of particular importance is what has been described the 'quite striking vagueness' of the Court's analysis of *VgT* and *TV Vest*.<sup>24</sup> Omitting even to include paragraph references, the Court made no attempt to expressly overrule either of these precedents.<sup>25</sup> This leaves open the possibility that future cases, which are even closer to the facts in *VgT* and *TV Vest* (for instance relating to an advert made in *response* to a commercial campaign or on behalf of a minority party) could still achieve a favourable outcome in Strasbourg.<sup>26</sup>

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<sup>20</sup> *VgT Verein gegen Tierfabriken v Switzerland* (No. 24699/94) ECHR [2001].

<sup>21</sup> *TV Vest AS v Norway* (No. 21132/05) ECHR [2009].

<sup>22</sup> *ADI v UK*, para. 49.

<sup>23</sup> *Ibid*, para. 108.

<sup>24</sup> Lewis, Tom, 'Animal Defenders International v The United Kingdom: Sensible Dialogue or a bad case of the Strasbourg Jitters?' (2014) 77 *Modern Law Review*, 3, p. 471.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*, p. 472.

Overcoming other barriers to reform

Before outlining a proposal for reform of the Communications Act, it is worth dealing with some of the other reasons that have been given for resisting anything less than a total ban. Of particular significance is the argument that television and radio are uniquely pervasive forms of media, able to reach the living rooms of most UK households in a way in other media cannot.<sup>27</sup> As a result, a total ban is viewed as both justified (because of the importance of maintaining political fairness and plurality) and proportionate (because of the availability of other outlets to political advertisers). However, it is clear that this situation is changing fast: internet-based television and social media have grown exponentially in the past decade and their influence is greater than ever.<sup>28</sup> Given the current rate of change, it cannot be long until this argument loses its validity.

It has also been suggested, both by the UK Courts and the UK government, that anything less than a total ban on political advertising is simply unworkable.<sup>29</sup> However, despite their continued insistence on this point, the government has produced little evidence to suggest that it has made any serious attempt to find an alternative. This point was made by several of the dissenting judges in *ADI*, who stated that the UK government were not able to refer to any expert report which examined whether there existed other practical solutions enabling both the scope of the prohibition to be reduced and its objectives to be conserved.<sup>30</sup>

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<sup>27</sup> *ADI v UK*, para. 119.

<sup>28</sup> Daniel Newman, 'Social Influence: More Than Just a Game', (2 June 2014), *Huffington Post*. Available from: [http://www.huffingtonpost.com/daniel-newman/social-influence-more-tha\\_b\\_4732545.html](http://www.huffingtonpost.com/daniel-newman/social-influence-more-tha_b_4732545.html) [accessed 21 September 2014].

<sup>29</sup> *ADI v UK*, paras, 17, 119; *R (ADI) v SoS DCMS* (2007), H.R.L.R. 9, para. 98.

<sup>30</sup> *Ibid.*, para. 17 (Dissenting Opinion of Judge Tulkens).

Furthermore, there seems to have been little recognition of the fact that other European countries, such as Denmark, have managed to create legislation which allows environmental and social groups to broadcast adverts, whilst preventing political parties from doing so.<sup>31</sup> Nor, for that matter, do they appear to have acknowledged the conclusion, reached by the European Platform of Regulatory Authorities (EPRA), that for several European countries the absence of *any* ban on political advertising 'does not seem to raise any specific problem or to cause any concern'.<sup>32</sup>

### Proposal for reform

There is therefore a strong case for parliament to amend the Communications Act. Such an amendment ought to allow charities and other social advocacy groups to advertise on matters of public interest, whilst still providing a defence against the domination of the airwaves by wealthy political groups. This could be achieved by inserting the following amended provisions.

First, an additional clause should be added to the list of OFCOM's standard objectives in s319(2), stating:

m) That advertising relating to matters of *public interest* is regulated according to the guidance set out in s321(4)

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<sup>31</sup> European Platform of Regulatory Authorities (17-9 May 2006), 'Political advertising: case studies and monitoring'. Available from: [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CFAQFjAG&url=http%3A%2F%2Fepra3-production.s3.amazonaws.com%2Fattachments%2Ffiles%2F1178%2Foriginal%2Fpolitical\\_advertising\\_final.doc&ei=Kk8MVIG8jY7qaL2lgrgC&usg=AFQjCNFDW5Pu-jmGEvsoz1bdKtaQvxBH9w&bvm=by.74649129.d.d2s](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CFAQFjAG&url=http%3A%2F%2Fepra3-production.s3.amazonaws.com%2Fattachments%2Ffiles%2F1178%2Foriginal%2Fpolitical_advertising_final.doc&ei=Kk8MVIG8jY7qaL2lgrgC&usg=AFQjCNFDW5Pu-jmGEvsoz1bdKtaQvxBH9w&bvm=by.74649129.d.d2s), p. 5 [accessed 21 September 2014].

<sup>32</sup> *Ibid.*, p. 7.

The introduction of this new 'public interest' category would enable the regulator, and ultimately the courts, to distinguish the messages of social advocacy groups like ADI from pure political campaigning. In doing so, they would continue to be assisted by extensive guidance from s321. Subsection 2 (quoted above), which describes the types of adverts which would be regarded as political should remain unchanged, but the definition of 'political' ends and 'political nature' should be significantly narrowed by an abbreviated subsection 3:

S321

(3) For the purposes of this section political nature and political ends include each of the following –

a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;

b) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends

This would continue to ensure that wealthy political parties would be unable to gain a political advantage through broadcasting. Subsection 3(b) would still be sufficiently wide to capture any subsidiary bodies, which are established and funded by political parties to campaign on single issues – a concern which is regularly raised about reform.<sup>33</sup>

All advertising which is deemed to be of a 'public interest' nature should be dealt with in a different way as outlined in a new subsection 4:

S321

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<sup>33</sup> For example, see: *ADI v UK*, para. 14.s

(4) For the purpose of 319(2)(m) adverts of a public interest nature shall be regulated by rules made by OFCOM. These rules must ensure that adverts of a public interest nature shall –

- a) not be permitted within 25 days of any national or local election or referendum
- b) be available free of charge
- c) be are allotted so as to ensure that balance is maintained and that a range of different issues are represented

It has been suggested that this would be an impossible task for any regulator.<sup>34</sup> However, under s333(2) of the Act, OFCOM already holds responsibility for determining which political parties should have access to party political broadcasts as well as their length and frequency. It is therefore not unreasonable to expect that it would also be able to formulate new guidance, which could, for instance, limit public interest adverts to two per month covering opposing views on a particular topic. This would ensure that the public are not bombarded by political messages. Ensuring that the adverts are free would prevent wealthy charities or groups from dominating the airwaves, and a total ban prior to elections would further mitigate against the risk of political parties seeking to use these provisions to gain an advantage. With appropriate guidance, it ought also to be possible for OFCOM to distinguish public interest adverts from political ones. This guidance should be contained in a new subsection 5:

(5) For the purpose of 319(2)(m) an advert will be deemed to be of a ‘public interest’ nature if it is –

- a) not a political advert as described in s321(2-3);
- b) not intended to sell any product or service;

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<sup>34</sup> *Ibid.*, para 47

c) intended to raise awareness of, or promote, an issue which is a matter of public interest;

Defining these against political adverts provides still further protection from parties seeking to purchase an electoral advantage, and the exclusion of any seeking to sell products and services ensures that the provisions in subsection 4 are not exploited by commercial companies.

In sum, this reform would enable the UK public and countless charities and social advocacy groups to reap the enormous benefits of free and available speech on matters of huge public importance, whilst simultaneously maintaining fairness and plurality in the political system. It would also protect the Communications Act against some of the ambiguity present in the Strasbourg case law and from the new challenges being brought by the growing influence of social media.

**2,996 words**