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TV: Regulation of Content in France and the UK  
British Broadcasting Corporation

## **Constitutional position of the BBC**

### Charter

In law, the BBC owes its existence to a Royal Charter. Although this is strictly a Charter granted by The Queen to the Governors of the BBC, in practice it comes up for debate in the Houses of Parliament whenever the existing Charter runs out and a new one requires to be put in place. So in effect it is treated in the same way as a statute - it comes before a political forum.

### Agreement

The second major legal document is the Agreement (or Licence and Agreement). This is a contractual document between the Governors of the BBC (who, in law, are the BBC) and one of the Secretaries of State, presently Tessa Jowell, the Secretary of State for National Heritage. Applying the general principles of the law of contract, this Agreement would be expected to confer legal rights only on the parties to the contract. However, it has not been interpreted by the Courts in that way. In cases involving political impartiality, the Judges have interpreted the Agreement as giving rise to third party rights. So citizens have been able to come forward to the courts and successfully challenge the BBC over alleged breaches of the terms of the Agreement. This has been particularly important in connection with political impartiality cases. The courts both in England and in Scotland have been willing to listen to arguments that the BBC has failed to observe the terms of Section 5(1) of the Agreement, which requires the BBC to be impartial on matters of political and industrial controversy. It has to be said that such cases often are the briefest of hearings before a harassed Judge only two or hours before a television programme is scheduled to be transmitted. Understandably, we do not find the highest quality of legal argument or reasoning in such a strained set of circumstances. However, it is clear that the British courts will not throw out the petition (which is usually raised by a politician) on the basis that he has no right to be there (*locus standi*) and only the Secretary of State could sue. Clearly, such a position would be highly unsatisfactory, because the Secretary of State is, of course, a party political figure and, as these cases come to court at election time, it would be surprising if the Secretary of State was anything other than totally partisan and therefore a wholly inappropriate person to come to an impartial view on this subject. Furthermore, as ITC companies are governed by the Broadcasting Acts 1990 and 1996 on the question of political impartiality, it would seem strange if the BBC could not be treated similarly by our courts.

### Regulation of content

The regulation requiring content to be of a certain standard or sort is to be found in the Agreement. However, the Agreement is not a particularly long document. Much more detail on content is to be found in the BBC's Producers' Guidelines (available at <http://publicpolicy.gateway.bbc.co.uk/editorial/Prodgl/prodgl.asp>). The first section of the Producers' Guidelines is the BBC's code on impartiality and accuracy. That code is almost certainly a justiciable document because it is a requirement in terms of the Agreement they hold from the Secretary of State for the BBC (ie the Governors) to promulgate and observe such code.

The rest of the Producers' Guidelines are just what they bear to be, namely guidelines. If called upon to argue the matter before a court, I would contend that these guidelines are non-judicial.

#### Problem areas: political impartiality

What then are the problem areas for content? I have already mentioned in my opening the question of political impartiality. In my experience, this has been the principal area of difficulty. That is because politicians are of the view that if they get a bad press, ie are criticised severely in the media, then the public probably will not vote for them. They hold this view despite the fact that all research shows that this is complete nonsense. Equally, they hold the view that the more they appear on television, the more the public will love them and vote for them. Particularly recently, and especially with young people, the evidence is that the public find politicians utterly repulsive people. A recent detailed BBC survey found that the British public did not think politicians had any redeeming features whatsoever. In an enormous checklist of negative and positive attributes, politicians scored nil on the positive side. So we can take comfort from the fact that politicians are infinitely less popular than lawyers. In fact, it is worse than that; they are less popular than journalists and double-glazing salesmen. So in truth the less they are on TV, the better the public like them! But try telling them that.

However, that rather egotistical and obsessive group of people are one of the main groups to come before the courts on alleged breaches of the rules on content - these cases proceed on the allegation that the BBC is not treating politics impartially. It is always the case that the politicians want more coverage of themselves and their party on TV. In Scotland, we face elections to the Scottish Parliament in May. We no doubt will have the usual threats and complaints from the political parties. I am delighted to say that all British political parties are presently in some financial difficulty and I would hope that they are so impecunious as to be unable to trouble me by going to court. However, you can never be sure.

#### Taste and decency

In terms of Section 5.1(d) the BBC does not transmit anything in programmes "which offends against good taste or decency". This, of course, is an extremely subjective area. Many great works of literature were regarded as highly offensive to good taste and decency when published. In particular, our French colleagues will think of Madame Bovary in this context.

Television broadcasters appreciate that they have to cater for the fact that their audience comprises both adults and children at certain times of the day. Accordingly, there had grown up an informal arrangement whereby a "watershed" is recognised. This is at 9.30pm in the

evening for the purposes of television. There is no radio watershed. Up to that point, broadcasters are expected to restrain themselves from broadcasting material which would be regarded as indecent for a younger audience. After that point, and particularly if they warn the audience more “adult”/risky material will be allowable.

The BBC had a most interesting example of the difficulties which may be thrown up by this regulation during the last General Election. The BBC used this Section of the Agreement to refuse to broadcast a party election broadcast on behalf of the Pro-Life Party. This broadcast had no words, but simply showed film of aborted fetuses being cut up for the purposes of medical research. The BBC, and indeed all other broadcasters, took the view that this could simply not go out. The Pro-Life Party went to court and failed at first instance. However, some time after the election was over, the Pro-Life Party succeeded in the English Court of Appeal. The Court of Appeal took the view that the terms of Article 10 of the European Convention were so strong in respect of political speech that this party election broadcast should have been allowed. The Court of Appeal refused leave to appeal, but the House of Lords has now granted this and the case is expected to go before the House of Lords early next year. But, if the BBC’s appeal to the House of Lords fails, at the next election we may expect to see similar film footage broadcast on all British television channels. I expect there is a chance that this problem, or some associated problem, will come up at the Scottish elections due to take place in May 2004.

### Crime and disorder

Separately, in terms of Section 5.1(d), the BBC must not broadcast any programme which contains content which “is likely to encourage or incite to crime or lead to disorder or to be offensive to public feeling”. In addition to this division in the Agreement, we should also remember that the provisions contained in the Obscene Publications Act and the Race Relations Act regarding obscenity and incitement to racial hatred apply to television broadcasts. Clearly these are to some extent a restriction of freedom of speech. However, in this particular context, unlike the context of the political speech at election time, Article 10 will almost certainly be insufficient to allow the broadcast of content which offends against this second part of Section 5.1(d). There would be no problem, however, in reporting the existence of political parties which held views which were racist in nature. The Jersild v Denmark case before the European Court of Human Rights makes this clear. Perhaps our French colleagues have had to deal with this kind of problem in connection with M. Le Pen’s political supporters, some of whom I understand hold quite racist views.

### Regulation by the Courts

#### Common law regulation: defamation/libel

Apart from something as dull as political impartiality, we have other areas of regulation of content. We have the common law requiring articles not to be libellous. The law of defamation in Scotland is similar to that in England, although I am pleased to say we very seldom have jury trials in Scotland. Jury trials have caused enormous problems in England because of the absurd level of damages given by English juries to claimants - in excess of a million pounds on occasions. Generally speaking, too, Scots take a more robust view on public debate. They are more likely to accept that people will be rude and derogatory about each other in the course of such debate. In short, they are not as sensitive as the English.

## Common law: contempt of court

Due to the fact that serious criminal cases are tried by juries in both England and Scotland, we have strict rules about pre-trial publicity. We call this area contempt of court. The lay people who make up the jury are deemed by the UK courts to be susceptible to having their minds changed by what they read in the newspapers or see on the television. Accordingly, there are restrictions on what may be said regarding the facts of the case prior to the completion of criminal proceedings - in fact these restrictions apply from the time of arrest. There is no doubt that the boundaries have been pushed out by the media over recent years. That is particularly true of Scotland, where a previously restrictive regime was substantially altered in 1998 in the case of Cox & Griffiths, Petitioners. That case, in which your President, Lord Prosser, sat, indicated that Article 10 of the ECHR now had to be given much more force in Scotland. Previously, Article 6 - the right to a fair trial before an impartial tribunal - had always trumped Article 10. In short, the Scottish courts paid virtually no heed to the concept of freedom of speech! I hope Lord Prosser will not take offence at hearing me say that, as he was always an honourable exception. However, I do not want to be too parochial and I have to acknowledge that the English courts have always been much more liberal towards the media in this regard, allowing them to publish a great deal more than the Scottish courts have done.

You may have been aware in France of the publicity surrounding the disappearance, and sadly now the murder, of two young girls, Holly Wells and Jessica Chapman, in the village of Soham in Cambridgeshire. The kind of pre-trial publicity which has gone unpunished in England would certainly not have been allowed in Scotland. I would be very surprised if there was not an attempt by the defence to claim that there has been adverse pre-trial publicity, and therefore that their client should not stand trial. Such pleas have never been successful in Scotland, but in England, on previous occasions, they have been. There would, of course, be public outrage if this were to happen, but it may take something as extreme as this to prevent the tabloid newspapers in Britain behaving as they have done over the Soham case.

## **Broadcasting Standards Commission**

### Fairness complaint

In terms of the Broadcasting Acts 1990 and 1996 the Broadcasting Standards Commission has jurisdiction over BBC television broadcasts. There are two main categories of complaint. Firstly, there is a fairness complaint, which is made in respect of what the complainer alleges is unjust or unfair treatment in television programmes. An associated, but not separate complaint is unwarranted infringement of privacy, either in respect of the content of the programme itself, or in respect of the method used to obtain the material to be included in such programmes. So privacy applies to cases even where there is no broadcast at the end of the day. This came into play in the BBC case against Dixons. In that case, the BBC were trying to obtain material from Dixons, the well-known high-street electrical retailer, to show that they were fraudulently mis-selling goods. Dixons had 11 criminal convictions for fraudulently mis-selling goods on past occasions. In the event, the BBC surreptitiously filmed within the business area of the shop. No wrong-doing was found. Dixons successfully complained to the English Divisional Court against the BBC for gathering material in that way. The court was not impressed by the BBC's argument that it was perfectly reasonable to suppose that Dixons were likely to be committing crimes yet again.

## (2) Standards complaint

A second sort of complaint is a standards complaint. This relates to the portrayal of violence or sexual conduct in programmes. A sub-division of this is taste and decency.

Recent examples from the Broadcasting Standards Commission's Bulletin of September 2002 are:-

- (a) A complaint upheld against 'They Think It's All Over', a BBC programme, where one of the panellists made fun of deaf people.
- (b) BBC Southern Counties Radio - a complaint against a presenter in Douglas was upheld on the basis that he made fun of someone who called into the programme.
- (c) A trailer for a programme called 'Execution Machine' was also upheld. This was on the basis of the watershed. The programme itself concerned the debate about the death penalty. A trailer which was broadcast pre-watershed (ie before 9.30pm, when there could be children watching) contained some scenes of the death penalty being carried out.

## Multi regulation

It will therefore be seen that, while there is statutory regulation of BBC television programmes by the Broadcasting Standards Commission that there is a degree of overlap with other regulatory bodies. It would be perfectly possible for someone to complain both to the Broadcasting Standards Commission and complain internally, firstly to the BBC's Programme Complaints Unit and then take an appeal if unsatisfied to the Board of Governors Appeal Committee. At the same time the person complaining could take proceedings in a court.

The decisions of the Broadcasting Standards Commission are judicially reviewable. The BBC had to challenge a decision the BSC made in a Panorama programme complaint when a pressure group representing one-parent families made a complaint to the BSC that the Panorama programme had wrongly portrayed one-parent families as spongers on the State. The organisation which complained was not represented in any way in the programme. They were not participants in the programme. So they had no *locus standi* to make a complaint; R v BCC ex parte BBC (1995) EMLR 241. So, to use an example, you cannot just come along to the Broadcasting Standards Commission saying you are, eg, French and the French people are made fun of in the programme "Allo 'Allo" so that you want to have an adjudication in favour of the whole French nation by the Broadcasting Standards Commission.

It has to be said that the Broadcasting Standards Commission has a very poor sense of humour. When the BBC made a programme on the reclusive but highly wealthy Barclay twins, they landed a reporter dressed as James Bond on the brothers' private island of Brecquhou in the Channel Islands. Despite the flippant approach of this programme, the Barclays litigated both in France and then before the Broadcasting Standards Commission in the UK. The BBC was found to be in breach of the Barclays' privacy; (1997) *The Times* 4<sup>th</sup> February. So we in television must learn to take life much more seriously.

## Conclusion

So the BBC producer or journalist going about daily work inside the BBC must be aware of the possibility of regulation being imposed in one or a combination of the following ways:-

1. by the internal Complaints Unit, or the Governors' Appeal Committee;
2. by the Broadcasting Standards Commission;
3. by the courts either reviewing a decision of the Broadcasting Standards Commission, or possibly the internal BBC regulatory system; or alternatively the courts dealing with some common law matter.

On the question of how severely the various regulators "bite", I suppose you would say that, if an individual is responsible for a programme which is found to be wanting in some respect by either the internal regulatory system or by the BSC, then, although no penalty is imposed, it will not do this individual's career any good. I perhaps should lodge one caveat here in that the BSC is perhaps not very highly regarded by many in the broadcasting industry and a finding against you might almost be sometimes regarded as a badge of honour in some quarters!

However, the real form of regulation which bites is the courts. An award of defamation damages, particularly involving expenses, as it will in the UK courts, is a severe penalty. So too is a finding of contempt of court, not only in the sense of penalty but in the sense that the broadcaster has done something against the interests of justice.

But at the end of the day, regulation can only hope to do so much. When you are dealing with an organisation with 25,000 employees spread all over the UK in different offices, you could not possibly control what is done by the means of law and regulation alone. What has to be produced is a culture of fairness; a desire for accuracy; a willingness to respect people's sensitivities. It is probably not for me as an insider to judge whether or not British television, and the BBC in particular, have such a culture. However, I can only say that I hope we are not doing too badly.

Alistair J Bonnington  
Solicitor, BBC Scotland