

COUNTDOWN TO THE ELECTION

1: Elections and free speech: the protection of political expression



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Synopsis

- In the run up to the General Election on 7 May 2015, Matrix will publish 6 briefings on a series of topics covering the vital issue of freedom of expression at election time. The topics are: (1) the protection of political expression; (2) lobbying and third-party campaigning; (3) election offences; (4) coverage of election campaigns; (5) party political broadcasts; and (6) defamation and privacy.
- This is the first of the briefings. It provides an overview of what constitutes 'political expression', and why and the extent to which it is protected. Many of the issues identified in this Briefing Note will be explored in greater detail in the subsequent 5 briefings.

Key legislation

[European Convention on Human Rights](#), art 10, & art 3 of the First Protocol

Key cases

Hrico v Slovakia

Reynolds v Times Newspapers Ltd.

Bowman v United Kingdom

Castells v Spain

Hrico v Slovakia

Lingens v Austria

Reynolds v Times Newspapers Ltd.

R (Woolas) v Parliamentary Election Court & Ors

What is 'political expression'?

1. Defining 'political' speech or expression is far from easy. Any definition will, inevitably, be influenced by the context in which it is considered. Courts have been required to consider what 'political' means in cases involving defamation¹, restrictions on advertising², charities³, extradition⁴, and judicial review⁵.
2. In [*Reynolds v Times Newspapers Ltd*](#),⁶ one of the reasons the House of Lords declined to provide protection in defamation cases for a separate category of political information was because of the difficulties of definition. Lord Nicholls considered that it "would be unsound in principle to distinguish political discussion from other matters of serious public concern".⁷ Lord Cooke recognized that the "rights and interests of citizens in democracies are not restricted to the casting of votes. Matters other than those pertaining to government and politics may be just as important in the community; and they may have as strong a claim to be free of restraints on freedom of speech".⁸
3. The European Court of Human Rights ("the European Court") has distinguished between three general 'types' of expression: political, artistic, and commercial. It consistently attaches great importance to political expression. The concept of political expression has been broadly interpreted by the European Court. It has been held to encompass defamation of the police: [*Thorgeirson v Iceland*](#) (1992); allegations of bias against a court: [*Barfod v Denmark*](#) (1989); and television advertising by animal welfare group: [*VgT Verein Gegen Tierfabriken v Switzerland*](#) (2001). The European Court has, however, tended to focus on whether the speech in issue involves a matter of public interest or concern rather than simply whether it concerns a political matter.
4. In [*Thorgeirson v Iceland*](#),⁹ the European Court held that there had been a violation of the article 10 rights of a journalist who had been convicted of criminal defamation for articles he had written about police brutality. It held that the heightened protection under article 10 was not confined to speech involving political issues, and observed that there was "no warrant in its case-

¹ [*Derbyshire CC v Times Newspapers Ltd*](#). [1993] AC 534; *Reynolds v Times Newspapers Ltd*. [2001] 2 AC 127.

² *R v Radio Authority, ex p Bull* [1997] 2 All ER 561, CA.

³ *McGovern v Attorney-General* [1982] Ch 321.

⁴ *Re Kolczynski* [1995] 1 QB 540.

⁵ *R v Barnett London BC, ex p Johnson* (1990) 88 LGR 73.

⁶ [2001] 2 AC 127.

⁷ *Ibid.*, at 204.

⁸ *Ibid.*, at 220.

⁹ (1992) 14 EHRR 843, at [64].

law for distinguishing between political discussion and discussion of other matters of public concern”.

Why is it protected?

5. Speech on political issues is recognized by the courts as an essential part of the democratic process. The importance of freedom of political speech has been emphasised in a number of domestic cases in the light of the decisions of the European Court on political speech. In [R v Secretary of State for the Home Department, ex p Simms](#),¹⁰ Lord Steyn said:

“...freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate...”

6. In [Turkington & Ors v Times Newspapers Limited \(Northern Ireland\)](#),¹¹ Lord Bingham observed:

“In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action...”

7. This approach reflects, to an extent, the attitude of the courts in the United States when considering political speech. In *City of Chicago v Tribune Co*¹² the Supreme Court of Illinois held that:

“...every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration is involved he shall have the right to speak his mind freely”.

8. In *New York Times Co v Sullivan*¹³ the Supreme Court of the United States observed:

“Thus we consider this case against the background of a profound national commitment to the principles that debate on public issues should be uninhibited, robust and wide-open, and that it may well

¹⁰ [2000] 2 AC 115, at 126F–H.

¹¹ [2001] 2 AC 277, at 290G–291B.

¹² 139 NE 86 (1923).

¹³ [376 US 254 \(1964\)](#).

include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials...

9. Of course, consideration of this issue in the US takes place in the context of the First Amendment which, on its face, provides unqualified protection for free speech. In contrast, the protection provided by article 10 of the [European Convention of Human Rights](#) (“ECHR”) is expressly qualified. The rationale for the protection of political discourse is, however, largely the same.

Extent of protection: heightened protection?

10. As speech on political issues and other matters of public interest is a vital part of the democratic process, it might be assumed that interference with it can only be justified in exceptional circumstances. Indeed, in [Hrico v Slovakia](#),¹⁴ the European Court observed that “there was little scope under article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest”.
11. This is reflected in the decision of the House of Lords in [Derbyshire CC v Times Newspapers Ltd](#)¹⁵, in which it was held that there was an absolute prohibition on the organs of government bringing claims for defamation. Lord Keith stated that:

“...not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such action would place an undesirable fetter on freedom of speech”.¹⁶
12. The House of Lords relied upon, in part, the reasoning of the Appellate Division of the Supreme Court of South Africa in *Die Spoorbond v South African Railways*.¹⁷ In that case Schreiner JA said:

“The normal means by which the Crown protects itself against attacks upon its management is political action not litigation...”
13. The logic of the House of Lords’ analysis would seem to require that politicians, and others occupying roles in the political process, should also be unable to sue for defamation where the words complained of relate to their political activities. The House of Lords rejected this approach relying, in part, on the fact that individuals could still bring claims as justifying its decision to prohibit organs of government from suing.

¹⁴ (2005) 41 EHRR 18, at [40](g).

¹⁵ [1993] AC 534.

¹⁶ *Ibid.*, at 549.

¹⁷ [1964] AD 999.

14. In *Goldsmith v Bhoyrul*,¹⁸ Buckley J held that the decision of the House of Lords in *Derbyshire CC v Times Newspapers Ltd* applied to political parties but did not preclude the founder of the political party (Sir James Goldsmith) from bringing a claim.
15. In *Reynolds v Times Newspapers Ltd*¹⁹ the House of Lords rejected a submission that the English common law should recognize a generic defence protecting political discourse in claims for libel. The House of Lords considered that such a defence would not provide sufficient protection for the reputation of individuals. Moreover, that it would be unsound in principle to distinguish between political expression and other matters of serious public concern. The House of Lords did, however, hold that the defence of 'qualified privilege' was available in respect of political information on the basis of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had an interest in receiving it. The defence of *Reynolds* privilege was abolished by the [Defamation Act 2013](#), s 4 and was replaced with the defence of 'public interest'. The new defence of public interest is intended to reflect the principles established in *Reynolds* and in subsequent case law.²⁰
16. The qualified nature of the right to freedom of speech on political matters – especially at election time – is demonstrated by the number of restrictions which exist. The main restrictions on freedom of speech at election time include:
 - Restrictions on campaign expenditure, lobbying and third party campaigning imposed by the [Representation of the People Act 1983](#) and the [Political Parties, Elections and Referendums Act 2000](#);
 - Various election offences, including the prohibition on making false statements of fact about the personal character or conduct of candidates: Representation of the People Act 1983, s 106;
 - Restrictions on political advertising imposed by the [Communications Act 2003](#), and publication of exit polls under the Representation of the People Act 1983;
 - Restrictions on party political broadcasts, and political advertising imposed by the Communications Act 2003;
 - The normal rules of defamation and privacy, which have limited and/or uncertain protection for political speech.

¹⁸ [1997] 4 All ER 268.

¹⁹ [2001] 2 AC 127.

²⁰ [Explanatory Notes to the Defamation Act 2013](#) at [29].

17. Whether any such interference with the right to free speech is justified in an individual case has to be considered taking into account all the facts and circumstances of that case. It will, however, have to be compatible with the protection provided by article 10 of the ECHR.

Freedom of expression under the ECHR

18. Article 10 of the ECHR provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

19. The justification for an interference under article 10(2) must be convincingly established.²¹ It must be prescribed by law, be directed to one or more of the objectives specified in article 10(2) and be shown to be necessary in a democratic society. “Necessary” is not synonymous with “indispensable”, neither does it have the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”.²² The correct approach to justification under article 10(2) is to consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2).
20. It is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them.²³

²¹ [Barthold v Germany](#) (1985) 7 EHRR 383, at [58].

²² [Handyside v United Kingdom](#) (1976) 1 EHRR 737, at [48].

²³ *Ibid.*, per Lord Hope at [61].

21. The extent of the protection given to political speech is of especial importance in its application to politicians and elections.

Politicians

22. The European Court has recognized that the speech of politicians must enjoy particular protection. The corollary, however, is that politicians must be more willing to tolerate criticism of them by others.
23. In [Castells v Spain](#),²⁴ the European Court observed that while “freedom of expression is important for everybody, it is especially so for an elected representative of the people”. That is because they represent their electorate, draw attention to their preoccupations, and defend their interests. As a result interferences with the freedom of expression of politicians “call for the closest scrutiny on the part of the Court”.
24. The European Court has consistently recognized that the press occupy a pre-eminent role in a democratic society to impart ideas and opinions on political matters and on other matters of public interest.²⁵ States therefore enjoy a narrow margin of appreciation in cases concerning politicians.²⁶
25. The leading case concerning published attacks on politicians is [Lingens v Austria](#).²⁷ In that case the European Court said:²⁸

“...freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

“The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt article 10(2) enables the reputations of others – that is to say of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the open discussion of political issues...”.

26. Politicians must also be more tolerant of attacks on them. In [Jerusalem v Austria](#),²⁹ the European Court observed that:

²⁴ (1992) 14 EHRR 153, at [42].

²⁵ [Flux v Moldova](#) (2010) 50 EHRR 34, at [32].

²⁶ *Ibid.*

²⁷ (1986) 8 EHRR 407.

²⁸ *Ibid.*, at [42].

²⁹ (2003) 37 EHRR 25, at [38].

“...the limits of acceptable criticism are wider in relation to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism...”

27. This required tolerance can extend to the private life of politicians and public figures, particularly where it has some relevance to their public duties.³⁰ In [Von Hannover v Germany](#),³¹ the European Court drew the “fundamental distinction” between “reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions...and reporting details of the private life of an individual who...does not exercise official function”. The reason for the distinction was that in the former case the press was exercising its vital role of “watchdog” in a democracy. Similarly, the public’s right to be informed can “in certain special circumstances” extend to aspects of the private life of public figures, particularly where politicians are concerned.³²
28. It is not just politicians that must be more tolerant. Private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate.³³ This approach can apply to others involved in the political process, not just politicians.³⁴ This has been recognized by the domestic courts. In [Carina Trimmingham v Associated Newspapers Ltd.](#)³⁵, the Court held that the claimant was a not a private individual because of her work as the press officer of one of the leading politicians in the country.
29. There are, however, limits to the right of free expression even on political issues. Article 10 does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern.³⁶ In [Lindon & Ors v France](#),³⁷ Judge Loucaides observed, in a concurring opinion, that “false accusations concerning public officials, including candidates for public office, may drive capable persons away from government service, thus frustrating rather than furthering the political process”.

³⁰ [Porubova v Russia](#) (App No. 8237/03).

³¹ (2005) 40 EHRR 1, at [63].

³² *Ibid.*, at [64].

³³ [Jerusalem v Austria](#) (2003) 37 EHRR 25, at [38].

³⁴ [Saaristo v Finland](#) (App No. 184/06).

³⁵ [2012] EWHC 1296 (QB), [2012] 4 All ER 717.

³⁶ [Savitchi v Moldova](#) (App No. 11039/02), at [46].

³⁷ (2008) 46 EHRR 35, at [O-111].

Elections

30. Article 3 of the First Protocol to the ECHR, dealing with the *Right to Free Elections* provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choice of the legislature ...”

31. Although article 3 of the First Protocol is in unqualified terms, the right to vote may be subject to limitations, provided they not impair the essence of the right. Whilst the exclusion of certain categories of person from the franchise may be compatible with the ECHR, the European Court has held that automatic blanket ban imposed on all convicted prisoners in England & Wales was disproportionate and therefore incompatible.³⁸ In [R \(Chester\) v Secretary of State for Justice](#),³⁹ the UK Supreme Court declined the invitation of the Attorney General not to apply the principles set out in the jurisprudence of the European Court on this issue.

32. The European Court has considered the right to freedom of expression in the context of this provision (ie at election time). Restrictions on free speech in election campaigns can be justified in pursuit of the legitimate aim of protection of the reputation or rights of others, provided they satisfy the requirements set out above.

33. In [Bowman v United Kingdom](#)⁴⁰ the European Court said:

“Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are interrelated and operate to reinforce each other: for example, as the court has observed in the past, freedom of expression is one of the ‘conditions’ necessary to ‘ensure the free expression of the opinion of the people in the choice of the legislature’. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely”.

34. In [Karako v Hungary](#)⁴¹, the European Court, in rejecting a politician’s complaint that his reputation as a politician had been harmed, referred to the fact that the applicant was a politician, active in public life, and that the

³⁸ [Hirst v UK \(No 2\)](#) (2004) 38 EHRR 40; (2005) 42 EHRR 41, [GC](#); and [Scoppola v Italy \(No 3\)](#) (2012) 56 EHRR 19, GC.

³⁹ [2014] AC 271.

⁴⁰ (1998) 26 EHRR 1, at [42].

⁴¹ (2011) 52 EHRR 36.

statement was made during an election campaign in which he was a candidate, and constituted a negative opinion regarding his public activities.

35. Domestic courts have increasingly recognized the sensitivity of the balancing exercising which must be carried out where the court is confronted with political speech at election time.
36. In *R (Woolas) v Parliamentary Election Court*,⁴² the Court observed that in considering whether there had been a breach of the Representation of the People Act 1983, s 106 it was obliged to have regard to ECHR, article 10. The impact of article 10 would, however, be limited if the expression in issue involved dishonest statements. That is because dishonest statements are “aimed at the destruction of the rights of the public to free election (article 3 of the First Protocol to the Convention) and the right of each candidate to his reputation: article 8(1)”. Moreover, that the “right of freedom of expression does not extend to the publishing, before or during an election for the purpose of affecting the return of any candidate at an election, of a statement that is made dishonestly, that is to say when the publisher knows that statement to be false or does not believe it to be true”.⁴³
37. These considerations apply where the court has to consider whether, in a defamation, case the words complained of are statements of fact or statements of opinion (or in the language of the European Court – value judgments). In *Waterson v Lloyd & Carr*,⁴⁴ Laws LJ, referred to “the common law’s increasing focus...on the balance to be struck between public interest and individual right: between free speech and private claims, rather than on reputation as akin to a property right”. He concluded that “a political context – and especially at election time – surely informs this balance”.

Conclusion

38. Despite the European Court’s deceptively attractive statement of principle *Hrico v Slovakia* that there is little scope under article 10(2) for restrictions on political speech the reality is that there are wide range of restrictions and limitations on the right to freedom of speech at election time. Those restrictions are both direct and indirect. To be compatible with article 10 they must pursue a legitimate aim, be necessary in a democratic society, and be proportionate. In deciding this question the court must subject the facts of the individual case to intense scrutiny. That exercise will, of course, be informed by the political context in which the speech takes. The remaining briefings in this series will consider and highlight the principal restrictions.

⁴² [2012] QB 1.

⁴³ *Ibid.*, at [105]-[106].

⁴⁴ [2013] EWCA Civ 136, at [67].

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Further information

Find out more about our election team at Matrix at matrixlaw.co.uk.

Look out for our next briefing on Friday 3 April on *Lobbying and Third Party Campaigning: The Current Controls*.