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STATES' POSITIVE OBLIGATIONS TO PROTECT DEMOCRATIC ELECTIONS FROM FOREIGN INTERFERENCE

IN *Bradshaw v United Kingdom* (2025) 81 E.H.R.R. 24 ("*Bradshaw*"), the European Court of Human Rights ("ECtHR") was invited to consider the scope of states' positive obligations under Article 3 of Protocol No. 1 ("A3P1") of the European Convention on Human Rights (the "Convention") to safeguard elections from foreign interference. Prior to *Bradshaw*, the Court's jurisprudence under A3P1 had been limited to cases alleging direct interference with electoral rights by the respondent state. Amidst concerns about political disinformation and foreign interference in the UK and across Europe, *Bradshaw* presented the Court with an opportunity to articulate whether the Convention requires states to protect electoral processes from interference by foreign states.

Bradshaw raises two questions under A3P1. First, it considers whether, and to what extent, states are subject to positive obligations to protect democratic elections from foreign interference. Second, it addresses whether those obligations encompass a duty to investigate credible allegations of foreign interference. The case also examines the relationship between the state's obligation to safeguard electoral integrity under A3P1 and the protection of freedom of expression under Article 10 of the Convention, raising broader questions about the role of the ECtHR in articulating principles to guide state responses in a manner consistent with freedom of expression.

The applicants were three Members of Parliament who, together with two life peers and a non-profit organisation, had unsuccessfully sought judicial review in the English High Court. Relying on the conclusions of two parliamentary inquiries undertaken between 2017 and 2019 by the House of Commons Digital, Culture, Media and Sport Committee ("DCMS") and the Intelligence and Security Committee of Parliament ("ISC"), the applicants contended that there was credible evidence of Russian interference in the Brexit Referendum, the 2019 UK general election and the 2014 Scottish Referendum seeking independence from the UK (at [7]). Before the ECtHR, the applicants argued that the UK had breached its positive obligations under A3P1, both by failing to investigate such interference and by failing to establish "an effective legal and institutional framework" to safeguard elections from foreign interference (at [99]). The applicants characterised these obligations as interdependent, arguing that the UK could not effectively implement appropriate safeguards in circumstances where it had "failed to investigate or had turned a blind eye to credible allegations" of foreign interference (at [108]).

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The applicants further contended that the state was subject to a distinct procedural obligation to investigate credible allegations of foreign interference under A3P1, drawing, by analogy, on the Court's jurisprudence under Article 2 of the Convention (at [109], [137]; see e.g. *Mocanu and Others v Romania* (2014) 60 E.H.R.R. 19, at [317]–[318]). By contrast, the UK denied the existence of a free-standing procedural obligation to investigate arguable violations of A3P1 and characterised the investigative obligations under A3P1 as "adjectival", serving only to support the efficacy of the primary right (at [102]).

The ECtHR rejected the applicants' submission that A3P1 gave rise to a free-standing procedural obligation to investigate arguable violations of individual rights, emphasising the need to distinguish such complaints from cases involving criminal complaints or "grave interferences with an individual's physical or psychological integrity" (at [137]–[139]). However, the Court accepted the applicants' broader contention that a state cannot meaningfully discharge its positive obligations to safeguard democratic processes if it ignores credible allegations of foreign electoral interference (at [138]).

Accordingly, the ECtHR held that a "flagrant failure" to investigate credible claims of foreign interference may constitute a violation of A3P1 where it undermines the state's capacity to adopt positive measures to safeguard elections "under conditions which ensure the free expression of the opinion of the people" (at [138]). Although the Court did not specify what would amount to a "flagrant failure", it described the investigative requirement as "antecedent" to the adoption of positive measures, enabling a state to identify the nature and extent of threats to electoral integrity and to formulate an appropriate response (at [139]).

In addressing the applicants' claim that A3P1 imposed a positive obligation to establish an effective legal and institutional framework to protect an electoral system from foreign interference, the UK maintained that the Court's case law had imposed a relatively narrow range of predominantly negative obligations on the state (at [100]). By contrast, the applicants argued that the Court's jurisprudence recognised a positive obligation on states to protect electoral processes from "improper domestic pressure" (at [106]; see e.g. *Karimov v Azerbaijan* (Application no. 12535/06), Judgment of 25 September 2014, not yet reported, at [42]–[50]; *Namat Aliyev v Azerbaijan* (2010) 57 E.H.R.R. 30, at [70]–[90]; *Communist Party of Russia v Russia* (2012) 61 E.H.R.R. 28, at [107]–[129]). As there was no principled distinction between domestic and foreign electoral threats, the applicants submitted that A3P1 should be understood as encompassing a positive obligation on states to safeguard elections from interference by foreign actors.

While the Court accepted the UK's submissions that the obligations imposed by A3P1 are predominantly negative in character, it recognised

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that, given the "significant threat to democracy" posed by disinformation, states may also hold positive obligations to respond to foreign electoral interference (at [135]). In particular, where there is "a real risk" that interference by a hostile state may undermine electoral processes "to such an extent as to impair their very essence", a state may be required "to adopt positive measures to protect the integrity of its electoral processes, and to keep those measures under review" (at [136]).

The more difficult aspect of the applicants' case lay in the substantive challenge to the adequacy of the UK's domestic legal framework pursuant to A3P1. Drawing on the ISC Report, the applicants argued that responsibility for preventing and responding to foreign electoral interference was "diffuse and inadequate" and that the entities that shared such responsibility "were reluctant to acknowledge or use their powers". They further contended that legislative measures adopted by the UK, following the initiation of proceedings before the ECtHR were "too little, too late" (at [151]). However, the enactment of a series of comprehensive reforms designed to address foreign electoral interference, including measures under the Elections Act 2022, the National Security Act 2023 and the Online Safety Act 2023, reinforced the Government's submission that it was "absurd" to suggest that it "had given no thought to the issues" raised by the case (at [154]).

The applicants' substantive case encountered a further difficulty, concerning the need to reconcile measures addressing foreign electoral interference with Article 10 of the Convention. The Court observed that, while foreign interference and political disinformation may undermine the Article 10 right to receive information, regulatory responses to such threats risk restricting political communication. Conscious of this tension, the Court held that any measures adopted by states to counter foreign electoral interference must "be calibrated carefully to ensure that they do not interfere disproportionately with individuals' right to impart and receive information, especially in the period preceding an election" (at [161]).

The Court ultimately held that, while there "were undoubtedly shortcomings in the Government's initial response", the ISC and DCMS Reports, together with the subsequent enactment of comprehensive legislative frameworks, addressed the concerns raised by the applicants (at [164]). The Court concluded that the UK's response did not "fall outside the wide margin of appreciation afforded to it" and any "failings" in the response could not "be considered to be sufficiently grave as to have impaired the very essence" of the applicants' rights under A3P1 (at [163], [172]).

The Court's unanimous judgment in *Bradshaw* underscores the seriousness of foreign electoral interference and disinformation as threats to democracy and affirms that A3P1 can impose positive obligations on states to respond to such threats. At the same time, the Court refrained from articulating

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prescriptive guidance as to how states are to reconcile their obligations to safeguard electoral integrity with the protection of political expression under Article 10 of the Convention. In particular, the Court refrained from addressing how the measures instituted by the UK to address foreign interference satisfy the positive obligations under A3P1 in a manner consistent with Article 10, despite emphasising the need to regulate foreign interference compatibly with the right to freedom of expression. The absence of more prescriptive doctrine was a central concern raised in Judge Jakab's concurring opinion, which called on the Court to more clearly specify the kinds of measures that would satisfy the state's positive obligations while remaining compatible with freedom of expression.

Although *Bradshaw* may be perceived as a missed opportunity for the Court to articulate more prescriptive principles concerning state responses to political disinformation and foreign interference, the decision must be understood in light of the challenges of crafting regulatory responses consistently with Article 10 of the Convention. Measures directed at countering foreign interference and political disinformation risk infringing the right to freedom of expression, particularly in the electoral context. This tension places the Court in a constrained position when elaborating the content of positive obligations on the state under A3P1. The judgment therefore illuminates a deeper question as to whether the Court is institutionally equipped to prescribe regulatory guardrails for states to address foreign electoral interference under A3P1, given the countervailing requirements of freedom of expression under Article 10 of the Convention.

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