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Towards introducing a new criminal offence covering politicians making egregious deceptive representations to the public†

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ABSTRACT

In recent years politicians have been increasingly accused of making deceptive representations to the public. The false or misleading information imparted in these representations has the potential to influence how the public forms political preferences, leading to broader democratic implications when the public engages in democratic procedures. While these representations have existed throughout British politics, recent scandals such as Partygate and the Brexit campaign have exposed their regular use. This shift has highlighted the need to reflect on what is being and should be done to deter politicians from making these representations. The purpose of this article is twofold. It explores why these representations are problematic and sets out to make a case for legal reform. In doing so it argues for a novel legal solution. Specifically, it advocates for a new criminal offence to address the most egregious deceptive political representations made to the public.

Keywords: political deception; false information; public law; criminal law.

INTRODUCTION

Deceptive representations (material statements of fact which are knowingly or recklessly false or misleading) have always been pervasive in the political domain.[1] Unlike other types of deceptive statements (like opinions or vague comments), deceptive representations carry greater credibility and influence. They are

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1 Paul Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (Cambridge University Press 2018) 229, 234–239, 241.

made with an apparent sincerity and certainty which offer the public something to rely on, inducing people to have false beliefs.

These representations are a staple in British politics. In the 1990s John Major lied to the public about not engaging in peace talks with the Irish Republican Army (IRA),[2] and just over a decade later, Tony Blair misrepresented the strength of the intelligence[3] as to Iraq having weapons of mass destruction.[4] While these representations have existed throughout British politics, recent scandals such as Partygate and the Brexit campaign have exposed the regularity of their usage.

Just a few years ago, Boris Johnson's claim that the United Kingdom (UK) would make a gain of £350 million a week if it left the European Union (EU) became a notorious example of deception in politics.[5] The implication was that the £350 million was a net gain, when in fact it 'did not take into account the rebate or other flows from the EU to the UK public sector'.[6] Another prominent instance was Boris Johnson's claim that he did not participate in breaches of Covid-19 social-distancing rules, saying 'anybody who thinks I was knowingly going to parties that were breaking lockdown rules ... [is] out of their mind'. This is despite having been previously reported as saying 'this is the most un-socially distanced party in the UK right now'.[7] This particular revelation invites questions about what the UK's approach to addressing deceptive representations is and whether it is fully fit for purpose.

Now, the UK has a framework in place to discourage, recognise, and sanction deceptive representations, as discussed below. The problem is that these mechanisms are deficient, either being unenforceable and ineffective at creating changes in behaviour, or they are enforceable but underutilised or overly niche. The result is that politicians are not discouraged from making these representations. In the meantime, the false or misleading information being imparted has the potential to influence how the public forms political preferences. This can have

2 Anthony Bevins, Eamonn Mallie and Mary Holland, 'Major's secret links with IRA leadership revealed' (*The Guardian* 28 November 1993).

3 BBC, 'Breakfast with Frost' 26 January 2003.

4 Committee of Privy Counsellors, *The Report of the Iraq Inquiry: Executive Summary* (HC 2016, 264) paras 540, 796. See also Gordon Corera, 'How the search for Iraq's secret weapons fell apart' (*BBC News* 13 March 2023).

5 Anushka Asthana, 'Boris Johnson: we will still claw back £350m a week after Brexit' (*The Guardian* 16 September 2017). Note: there is an argument to be made that he perhaps did not know that the figure would be misleading (at least at first). However, what is particularly telling is that he continued to make the claim after the UK Statistics Authority concluded that it was misleading.

6 Office for National Statistics 'Leave campaign claims during Brexit Debate' (*Office for National Statistics* 7 February 2017).

7 Sachin Ravikumar, Kylie MacLellan and William James, 'UK's Boris Johnson and the "partygate" scandal' (*Reuters* 15 June 2023).

broader democratic implications when the public engages in democratic procedures.

This article is arguing for a new criminal offence which would complement the existing framework. Such criminalisation has been attempted before, as with the Elected Representative (Prohibition of Deception) Bills of 2006 and 2023. However, these attempts have been unsuccessful and never came close to being enacted into law. The suggestion being made is that we should still use the criminal law but take a different tack and impose a more effective deterrent. What this article advocates for is a new and more narrowly drafted criminal offence (compared to those that have previously been suggested). Specifically, it would be one which is targeted at the most egregious deceptive representations which are made to the public. Importantly, this strikes the balance between intervening to provide some protection from democratic harms whilst not overextending the criminal law or giving substance to objections, such as concerns over free speech or the politicisation of the judiciary.[8]

To substantiate this argument, this article adopts a tripartite structure. It begins by using political theory to explain why making deceptive representations to the public is problematic. It then critically assesses the efficacy of the mechanisms forming the UK's current approach, finding them to be deficient. Finally, it proposes a way that this deficiency can be addressed and advocates for a new offence. It is beyond what can be achieved here to outline a complete draft offence, but this article puts forward a provisional idea of what it could involve. In particular, it highlights certain elements which should form the foundation of the offence, with the aim of capturing the most egregious deceptive representations.

THE PROBLEM OF DECEPTIVE POLITICAL REPRESENTATIONS

Why are deceptive representations to the public problematic?

Understanding why deceptive representations are a problem returns to the broader question of how the public forms political preferences. Elite influence as a whole is widely appreciated as being a significant factor in shaping political opinions. 'Citizens have clear incentives to take

8 Eg Kent Greenawalt, 'Free speech justifications' (1989) 89 Columbia Law Review 119–155, 119; Eric Barendt, *Freedom of Speech* (2nd edn Oxford University Press 2007) ch 3; Jeremy Horder, 'Criminal law at the limit: countering false claims in elections and referendums' (2021) 84(3) Modern Law Review 429–455, 433.

political cues from those more knowledgeable, typically experts or elites whose views are conveyed by the media.'[9] The elites which carry this influence are a 'wide range of individuals and organizations, including politicians and political officials, policy experts, interest groups, religious leaders, and journalists'.[10] Politicians in particular (by this I mean those who are in Parliament, Government or local councillors) are fundamental to forming and shaping public opinion. They have the unique position of not only being professionals in the political field but also being informed of and party to the inner workings of policy. This is something which the majority of the public is not well versed in, so the ideal is that the public defers to politicians and draws on their expertise. The issue is that when politicians deceive this arrangement is threatened because the information being imparted is corrupted. It is then possible that the public is forming political opinions from a knowledge base which is comprised of false or misleading information.[11]

With that being said, how the public forms political opinions is a multifaceted issue. In particular, heuristic factors (cognitive short-cuts which enable the public to 'be knowledgeable in their reasoning about political choices without necessarily possessing a large body of knowledge about politics')[12] are increasingly recognised as important. Lepoutre, for instance, puts great emphasis on these factors. He argues that there is an:

> assum[ption in democratic theory] that ... [the public is] trying to form accurate or reliable political judgments. But there is ample evidence suggesting that, when it comes to politics, people simply accept whatever their social group tells them to believe.[13]

People often draw upon their social group, partisanship[14] or even emotive intuitions (eg the likeability of a party or inferences about a

9 Martin Gilens and Naomi Murakawa, 'Elite cues and political decision making' (2002) 6 Political Decision Making, Deliberation and Participation 15–49, 15.

10 Ibid 16.

11 For a discussion on rational choice theory in politics, see Joe Oppenheimer, *Principles of Politics: A Rational Choice Theory Guide to Politics and Social Justice* (Cambridge University Press 2012) 15.

12 Paul M Sniderman, Richard A Brody and Phillip E Tetlock, *Reasoning and Choice: Explorations in Political Psychology* (Cambridge University Press 1991) 19.

13 Maxime Lepoutre, 'Democratic group cognition' (2020) 48(1) Philosophy & Public Affairs 40–78, 41.

14 Jeffrey Mondak, 'Public opinion and heuristic processing of source cues' (1993) 15(2) Political Behaviour 167–192, 182–184.

candidate's character).[15] Seen in this light, political opinion formation needs to be recognised as a complex and multifaceted theory.

While it is important to stress that this is not a straightforward issue and that a politician's influence may not be determinative in how opinions are formed, it still has a role.[16] Even new empirically based studies note its significance. Take, for instance, Clarke and colleagues' mass observation project into voting in the Brexit referendum.[17] The results indicated that, when developing opinions, panellists often fell back on feelings.[18] The findings showed that '[m]any panellists looked to the campaign for help, at least initially. They read leaflets and newspapers, watched television and listened to the radio.'[19] The problem was that the misleading, unverified and contradicting claims left them feeling uninformed, and members of the public were forced to use their instinct to fill that deficit.[20] These findings are consistent with Mitchell's analysis of the Scottish independence referendum. He too noted that the diversity of opinions on independence led to division within parties, 'and opinions on each side of the debate limited the extent to which clear differences could emerge on position issues'.[21] The contradiction did not provide voters with clear information which they could use to develop their preferences.

Another example is Arceneaux's cross-national analysis of the impact of election campaigns as informational tools and their use by voters.[22] Survey data from nine European countries across 12 years indicated that voter learning actually improved when parties campaigned. Although Arceneaux did observe that 'voters' pre-existing attitudes and assessment of things beyond the control of political campaigns, like the

15 Samuel L Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* 2nd edn (University of Chicago Press 2020) 7, 44, 65. See also, James H Kuklinski and Paul J Quirk, 'Reconsidering the rational public: cognition, heuristics, and mass opinion' in Arthur Lupia, Mathew D McCubbins and Samuel L Popkin (eds), *Elements of Reason: Cognition, Choice, and the Bounds of Rationality* (Cambridge University Press 2012) 153–159.

16 Eg Gregory B Markus, 'The impact of personal and national economic conditions on the presidential vote: a pooled cross-sectional analysis' (1988) 32 American Journal of Political Science 137–154, 137.

17 Nick Clarke et al, 'Voter decision-making in a context of low political trust: the 2016 UK EU membership referendum' (2023) 71(1) Political Studies 106–124, 110–118.

18 Ibid 107.

19 Ibid 113.

20 Ibid 115–116.

21 James Mitchell, 'The Referendum Campaign' in Aileen McHarg et al (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 93.

22 Kevin Arceneaux, 'Do campaigns help voters learn? A cross-national analysis' (2006) 36 British Journal of Political Science 159–173, 160, 164–169.

economy, have the strongest impact on voting decisions', he also noted that 'campaigns play a major role in producing these effects'.[23] In other words, whilst heuristic factors were present, their existence did not invalidate the fact that information being imparted by politicians also had influence.

It thus follows that deceptive representations which are made by politicians are problematic. They give the public a flawed knowledge base on which to make decisions, something which has broader democratic implications when the public then engages in democratic procedures whether it be institutional, for example voting in referendums or elections, or alternative and ongoing signalling procedures, for instance protesting, petitioning or the critiquing of policy decisions.[24] Having explored the problematic nature of deceptive representations, the next section of this article will critically assess the UK's current approach, asking whether it is fit for purpose.

THE FAILURE OF THE CURRENT APPROACH

The current approach to tackling these representations can be broadly distinguished into two themes: an approach based on a lack of intervention and unenforceable mechanisms (ie the self-correcting public debate) and regulation which is mandatory and/or enforceable.

The self-correcting public debate

The first part of the approach is based on non-intervention, essentially relying on the idea that public discussion has the ability to self-correct. Such a theory is advocated by free speech scholars including Mill,[25] Justices Brandeis and Holmes,[26] and Meiklejohn,[27] who have all suggested that the public debate has the capacity to identify problematic speech (eg false or dangerous rhetoric) and remove it from circulation. The theory is that unconstrained public discussion provides an open platform for ideas, so initially all ideas have equal status. However, as time and the discussion develop the public is able

23 Ibid 160.

24 See Sofie Marien and Henrik Serup Christensen, 'Trust and openness: prerequisites for democratic engagement?' in Kyriakos N Demetriou (ed), *Democracy in Transition: Political Participation in the European Union* (Springer 2012) 109, for discussion on alternative forms of activism.

25 John Stuart Mill, *On Liberty* 4th edn (Longmans, Green, Reader & Dyer 1869) 94–95.

26 *Abrams et al v United States* (1919) 250 US 616 Supreme Court, at 630–631 per Justices Holmes and Brandeis.

27 Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (HarperCollins 2001) 26–27. See also Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper 1960) 27.

to scrutinise and challenge different ideas.[28] As ideas are tested some are able to withstand the scrutiny, while others have their weaknesses exposed and are defeated. The argument is that the best and most rational idea emerges victorious. Under this interpretation a deceptive representation can be introduced into public discussion but it will eventually be exposed.[29] The logic is that 'the good will over time drive out the bad and the true prevail over the false'.[30] Rather than restraining or deterring a type of speech, the public debate should be enriched with more speech and counter speech ('communication that seeks to counteract potential harm that is brought about by other speech')[31] to help identify problematic types of expression.[32]

While the self-correcting speech model has appeal, it is not the answer to addressing this problem. As argued by other scholars (eg Coe[33] and Rowbottom)[34] this model is fraught with difficulties and is an idealistic representation of how public debate works. The core issue is that our cognitive processes are not framed in a way which makes us easily susceptible to changing our beliefs. Individuals are not only biased towards evidence which is familiar[35] but that which fosters confirmation of their previous beliefs.[36] Political studies – such as those conducted by Nyhan and Reifler, Taber and Lodge, and Lord and colleagues[37] – share the finding that the public is resistant

28 *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, (2008) 1 AC 1312, para 28 per Lord Bingham.

29 *Abrams* (n 26 above) 630–631.

30 *R (Animal Defenders International)* (n 28 above) para 28 per Lord Bingham.

31 Bianca Cepollaro, Maxime Lepoutre and Robert Mark Simpson, 'Counterspeech' (2023) 18(1) Philosophy Compass 1–11, 2.

32 *Whitney v California No 3* 274 US 357 (1927), 377 per Justices Brandeis and Holmes.

33 Peter Coe, 'Tackling online false information in the United Kingdom: the Online Safety Act 2023 and its disconnection from free speech law and theory' (2023) 15(2) Journal of Media Law 213–242, 223–227.

34 Jacob Rowbottom, 'Lies, manipulation and elections – controlling false campaign statements' (2012) 32(3) Oxford Journal of Legal Studies 507–535, 522–524. See also, Irini Katsirea, '"Fake news": reconsidering the value of untruthful expression in the face of regulatory uncertainty' (2018) 10(2) Journal of Media Law 159–188, 184–185.

35 Ullrich K H Ecker et al, 'The psychological drivers of misinformation belief and its resistance to correction' (2022) 1 Nature Reviews Psychology 13–19, 15–16.

36 Ibid 13. See Rowbottom, (n 34 above) 522–523.

37 Brendan Nyhan and Jason Reifler, 'When corrections fail: the persistence of political misperceptions' (2010) 32(3) Political Behavior 303–330; Charles S Taber and Milton Lodge, 'Motivated skepticism in the evaluation of political beliefs' (2006) 50(3) American Journal of Political Science 755–769; Charles G Lord, Lee Ross and Mark R Lepper, 'Biased assimilation and attitude polarization: the effects of prior theories on subsequently considered evidence' (1979) 37(11) Journal of Personality and Social Psychology 2098–2109.

to information which contradicts their beliefs. In these studies, individuals were presented with information which challenged their initial assumptions on controversial political issues, for example capital punishment,[38] weapons of mass destruction, or tax cuts.[39] Even when confronted with contradicting evidence, individuals were unconvinced[40] and in some cases their commitment to the false belief was affirmed. This demonstrates the general issue with the self-correcting model. If the public is not able to be open to identifying and correcting their misperception, then the deceit will not be defeated and removed from discussion.

Of course, one may counter this assessment of the model with the admission that, yes, the theory in its original form is flawed, but a modified version could be effective. To a degree this can be accepted. Studies by those such as Kuklinski and colleagues have demonstrated that the public can be induced to correct their belief[41] when the counter speech is more sophisticated than the mere counteraction of a particular view by ordinary citizens.[42] Instead, there needs to be an authoritative statement, provided by a recognised source such as a state actor.[43] While fact-checking news and current affairs is becoming more commonplace,[44] in the UK we do not have a single authoritative, unbiased and independent body to consistently check political statements. On the odd occasion, we have tried to use the UK Statistics Authority to correct misperceptions. In the midst of the Brexit campaigning, for example, the UK Statistics Authority (an impartial body) intervened and highlighted the limitations of the claim that £350 million would be invested in the National Health Service (NHS) if the UK were to leave the EU.[45]

However, this example is a good illustration of the way that even with this intervention the narrative can remain uncorrected. In Clarke and colleagues' study, for instance, panellists found that it was 'increasingly hard to decipher and believe' the different claims put forward.[46] Part of the issue was that the UK Statistics Authority was not established as the leading authority on correction, so when public figures endorsed a

38 Lord et al (n 37 above) 2105–2107.
39 Nyhan and Reifler (n 37 above) 314–320.
40 Ibid 314–320. See also Lord et al (n 37 above) 2099–2100.
41 James H Kuklinski et al, 'Misinformation and the currency of democratic citizenship' (2000) 62(3) The Journal of Politics 790–816, 792.
42 Rowbottom (n 34 above) 523.
43 Cepollaro et al (n 31 above) 3.
44 Full Fact.
45 UK Statistics Authority, 'Statement on the use of official statistics on contributions to the European Union' (UK Statistics Authority 27 May 2016).
46 Clarke et al (n 17 above) 114.
47 Ibid 114.

wide range of claims, it was still difficult for the public to identify the deception. Nevertheless, even if such a body was able to establish itself as being *the* leading authority on exposing deceitful representations, it would likely encounter a number of logistical issues if it was used with greater frequency and on a wider scale.

First, effective countering would be financially and practically difficult. It would require a burdensome amount of time and resources to interrogate and investigate the claims being made and then spread the exposure of the deceit to the public. The message would need to be conveyed with sufficient accessibility,[47] reach, and frequency,[48] likely needing to be communicated in a number of ways so as to reflect how different generations consume news.[49] These logistical demands would deplete the UK Statistics Authority's limited funds and resources. In all likelihood, opening it up to criticism, as has been the case with other authorities or regulators who are underfunded, under-resourced and increasingly asked to do more.[50]

Second, there may be particular difficulty in correcting the discussion when the deceit is circulated right before a fixed democratic procedure (eg days before a referendum or election). In such circumstances, there simply would not be time to investigate and then attempt to correct the narrative: the damage would already be done.[51] It is also worth noting that even if the UK Statistics Authority had the funds and resources to effectively identify and counter deceptive political representations, some members of the public still may not be convinced. After all, as said above, humans are predisposed to cling to their false beliefs. All this considered, neither the original nor the modified theory of self-correction is the answer to addressing deceptive political representations. With this analysis undertaken, this brings this article to its next section: examining the regulatory mechanisms.

The regulatory mechanisms

The starting point for an analysis of the regulatory part of the framework are the Principles of Public Life, which, unlike measures such as ministerial responsibility, apply to all public officials. Following the recommendations of the 1995 Nolan Report, seven principles were introduced (selflessness, integrity, objectivity, accountability,

48 Brian G Southwell, Emily A Thorson and Laura Sheble, *Misinformation and Mass Audiences* (University of Texas Press 2018) 5.

49 *News Consumption in the UK: 2024* (Ofcom 10 September 2024).

50 Tom Gerken, 'Ofcom needs more powers to remove misleading posts, says watchdog' (*BBC News* 7 May 2025).

51 See broadly, Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (The Constitution Unit 2019) 39.

openness, honesty, and leadership),[52] becoming the quintessential basis for what political behaviour should be. A select few have particular applicability to addressing political deceit. The most obvious one is honesty – that public office holders 'should be truthful'[53] in the statements they make or promote.[54] There are also associated values of accountability and openness, which encourage transparency ('unless there are clear and lawful reasons for [not] doing so')[55] and the scrutiny of behaviour more broadly. These principles form part of many codes of conduct, including the Ministerial Code and the codes for the House of Commons, House of Lords, and local councillors which all hold an overarching duty to observe them.[56]

For the most part, non-compliance with these principles does not result in punitive action. The principles tend to be used as part of an integrity-based model,[57] relying on individual consciences, rather than an overseeing body to regulate behaviour. The premise is that ethical principles are not enforced but embedded into political culture,[58] over time becoming internalised norms of what is acceptable.[59] However, political practice still seems to be fraught with scandals and poor behaviour,[60] suggesting that relying on individual consciences to uphold these principles is not effective.[61] As Member of Parliament (MP) Liz Saville puts it, 'we are no longer in [a] … world … [where]

52 Committee on Standards in Public Life, chaired by Lord Nolan, *Standards in Public Life: Volume 1* (Nolan Report) (Committee on Standards in Public Life 1995) 14, para 55.

53 Committee on Standards in Public Life, 'The Seven Principles of Public Life' (*Gov.UK* 31 May 1995).

54 Richard Thomas, 'Fake news and the Nolan Principles' (*Committee on Standards in Public Life* 6 March 2017).

55 Committee on Standards in Public Life (n 53 above).

56 Cabinet Office, The Ministerial Code (*Cabinet Office* October 2025) para 1.4. See also House of Lords, C*ode of Conduct for Members of the House of Lords and Guide to the Code of Conduct* (HL Paper 109–I 2025) 2–3, paras 6–8; House of Commons, *The Code of Conduct Together with the Guide to the Rules Relating to the Conduct of Members* (HC 1083 2023) 2–3; Local Government Association, 'Code of Conduct and Standards' (*Local Government Association* nd).

57 Franklin M Lartey, 'Integrity-based and compliance-based ethics programs: a critical analysis of key differences' (2021) 5(5) International Journal of Business Economics and Management 43–53, 44.

58 Committee on Standards in Public Life (n 52 above) 3, para 6.

59 Paul Spicker, 'Seven Principles of Public Life: time to rethink' (2014) 34(1) Public Money & Management 11–18, 11–12.

60 Martin Bull, 'Whatever happened to the Nolan Principles? Sleaze in the government of Boris Johnson' (*LSE British Politics and Policy* 17 May 2021).

61 Robert Roberts, 'The rise of compliance-based ethics management' (2009) 11(3) Public Integrity 261–278, 261–273.

chivalry and words as bonds …'[62] are enough to regulate most political behaviour.

Of course, there are tweaks which could be made to improve the normative force of these principles. For example, a 2023–2024 report from the Committee on Standards in Public Life proposed that MPs undertake an oath to follow the Principles of Public Life.[63] It would be similar to the affirmation of allegiance which is made to the King before parliamentarians take their seats,[64] involving 'a declaration of commitment to the Nolan principles at the start of a Member's parliamentary career, renewed every time they are re-elected to the House'.[65] An oath goes beyond a promise, in the sense that it is not just promising to do or not to do something, it is more comprehensive and changes who one is. As put by Sulmasy:

> [i]t is a self-performative utterance. It is not merely a commitment to do something or not to do something [in private, as is the case with a promise]. It is a [public] commitment to be a particular sort of someone. And this is why a violation of an oath seems so serious. A promise does put the promisor at risk of losing his or her reputation. But an oath [compounds this and] risks the hono[u]r and person of the one who swears[,] in a much deeper way.[66]

In this sense, an oath is a very serious commitment and is a strong moral obligation.

This article accepts this line of reasoning and argues that an oath to uphold the Principles of Public Life should be introduced. While the substantive content would be the same as the codes of conduct, empirical evidence demonstrates that oaths are successful at guiding behaviour. For example, studies into virginity pledges,[67] healthy eating[68] and

62 'Elected Representatives (Prohibition of Deception)', HC Deb 28 June 2022, cols 183–185 (Liz Saville).

63 Committee on Standards in Public Life, *The House of Commons Standards Landscape: How MPs' Standards and Conduct Are Regulated* (HC 247 2023–2024) 26–27, paras 108–113.

64 Ibid 26, fn 89. 'The Parliamentary Oaths Act 1866 sets out the requirement to take the oath, the place in which it is to be administered and the penalties applicable to any MP who takes part in parliamentary proceedings without having taken the oath; the Promissory Oaths Act 1868 sets out the wording of the oath; and the Oaths Act 1978 prescribes the form and manner of administering and taking it.'

65 Committee on Standards in Public Life (n 63 above) 27, para 113.

66 Daniel P Sulmasy, 'What is an oath and why should a physician swear one?' (1999) 20 Theoretical Medicine and Bioethics 329–346, 332.

67 Peter S Bearman and Hannah Brückner, 'Promising the future: virginity pledges and first intercourse' (2001) 106(4) American Journal of Sociology 859–912, 859.

68 Sekar Raju, Priyali Rajagopal and Timothy J Gilbride, 'Marketing healthful eating to children: the effectiveness of incentives, pledges, and competitions' (2010) 74(3) Journal of Marketing 93–106, 93.

non-smoking[69] all point to it being an effective tool for changing behaviour. An oath would invoke a stronger level of commitment to the principles than what is already in place. Essentially, 'prick[ing] the conscience of those who have sworn the oath and are tempted to violate one of its precepts'.[70] Additionally, reaffirming commitment to the principles every time they are elected should remind Members of the Westminster Parliament what they should be striving for and put it at the forefront of their minds.

Nonetheless, the efficacy of an oath is always going to be contingent on those partaking, particularly them having the intention and desire to uphold it.[71] If oath-takers lack this intention they will see the oath as a performance as opposed to something meaningful,[72] undermining the normative force of the commitment. General observations about political practice[73] and recent events such as Partygate, the Brexit campaign and the election betting scandal, suggest that a significant number of politicians may not be committed to these principles and, thus, the oath may not have a transformative effect. Although its impact would likely be modest, it is still worthwhile introducing an oath to *enhance* compliance with the Principles of Public Life amongst those who already uphold them. It is an opportunity to bolster commitment to the Principles and encourage truth and honesty in the political sphere.

Although the Principles of Public Life mainly operate as guidance for political behaviour, they do have some capacity to trigger sanctions. For instance, in Northern Ireland the Ministerial Code (which incorporates these Principles) is legally enforceable. Similarly, local councillor Codes of Conduct use the Principles of Public Life to create rules, which if breached can result in the councillor being removed from their role by the local authority.[74]

Another notable example is the Westminster Ministerial Code where the principles are enforceable as standards of behaviour. There is not only an overarching duty placed on ministers 'to adhere to the Seven Principles of Public Life',[75] but a specific stipulation that ministers should be as open as possible with Parliament and the public. Refusal

69 John H Hallaq, 'The pledge as an instrument of behavioral change' (1976) 98(1) The Journal of Social Psychology 147, 147–148.

70 Sulmasy (n 66 above) 339.

71 See, Herbert J Schlesinger, *Promises, Oaths, and Vows: On the Psychology of Promising* (Taylor & Francis 2008) 44.

72 Committee on Standards in Public Life (n 63 above) 27 para, 111, fn 97 Q198.

73 Rory Stewart, *Politics on the Edge* (Random House 2023).

74 Local Government Association, 'Guidance on Local Government Association Model Councillor Code of Conduct' (*Local Government Association* 8 July 2021).

75 Cabinet Office (n 56 above) para 1.4.

to provide information is only permissible when disclosure would not be in the public's interest.[76] Breaching these ministerial standards can result in an investigation and sanctions (eg a public apology, remedial action, removal of ministerial salary, or removal from office). Although the Prime Minister can ask the Independent Advisor to investigate a matter and the Independent Advisor can make recommendations, the ultimate judge of whether there has been a breach and what the consequence should be is the Prime Minister.[77]

While this seems acceptable in principle, its use gives rise to multiple flaws in practice. One problem is that this mechanism is underutilised. The Prime Minister does not refer allegations of deceptive representations for investigation,[78] even when notified about potential breaches.[79] Another problem is that the Prime Minister has the ability to ignore the finding that a breach has occurred. Although the Prime Minister usually follows the advice of the Independent Advisor, there are instances where the findings of their investigation have not been accepted. One notorious example concerns Boris Johnson, who ignored his then-advisor's findings that Priti Patel was bullying members of staff, allowing her to breach the code without repercussion (aside from an apology).[80]

Some aspects of the problem may be ameliorated due to the requirements of the recently updated Ministerial Code. Now, the Independent Adviser has greater autonomy because they have the power to launch investigations into potential breaches without the Prime Minister's approval.[81] This means that instances of deception which had previously not been investigated may now gain attention and be looked into. However, decisions as to whether a breach has occurred, whether to impose a sanction, and the form it should take, all still lie with the Prime Minister.[82] The point at issue is that, largely for the reasons given, the Ministerial Code and the Principles of Public Life are not appropriate for addressing deceptive representations which are made to the public. The insufficiency of the existing regulatory mechanisms is one that extends beyond the Ministerial

76 Ibid para 1.4(e).
77 Ibid para 2.7.
78 Based on the Annual Reports of the Independent Advisor of Ministers' Interests (*Gov.UK* nd).
79 Eg Full Fact notified the Home Office about the misuse of immigration statistics. In doing so, they referred to Suella Braverman. Hannah Smith, 'Who are the 100 million displaced people Suella Braverman said could qualify for UK protection?' (*Full Fact* 9 March 2023).
80 Simon Murphy 'Alex Allan: the veteran windsurfing mandarin who quit over Patel row' (*The Guardian* 20 November 2020).
81 Cabinet Office (n 56) para 2.6(b).
82 Ibid paras 2.6–2.7.

Code and continues to affect the legal remedy (namely, section 106 of the Representation of the People Act (RPA) 1983).

Section 106 is integral for any analysis of regulating deceitful representations made to the public because it is the only legal mechanism which specifically targets this problem. It is supposed to create a deterrent against electoral defamation. Section 106 makes it an illegal practice for a person to make or publish 'any false statement of fact in relation to [a] ... candidate's personal character or conduct',[83] 'before or during an election',[84] 'for the purpose of affecting the return of any candidate at the election',[85] unless the individual can show that they 'had reasonable grounds for believing, and did believe, the statement to be true'.[86] It draws together civil remedies and criminal sanctions. For instance, a candidate could apply for an interim injunction by which to restrain the distribution of the deceit.[87] Once the election has finished, a candidate may then put forward an electoral petition, requesting that the election be declared void.[88] It is also possible for criminal proceedings to be brought 'without there previously having been an election petition'[89] and upon a summary conviction a defendant will receive a maximum of a level 5 fine.[90] If the illegal practice is proved, the guilty person would then be disqualified from being elected to or taking their seat in the House of Commons for three years.[91]

Section 106 already has limited applicability because it only targets electoral defamation. However, the legislative drafting imposes additional requirements, reducing its coverage further. One requirement is that it only applies to the personal conduct of a candidate.[92] The courts have repeatedly emphasised that there is a distinction between 'whether the statement is one as to the personal character or conduct[,] or a statement as to the political position or character of the candidate'.[93] The former is actionable and the latter is not. Another requirement is that section 106 is only applicable in cases

83 RPA 1983, s 106(1)(b).
84 Ibid s 106(1)(a).
85 Ibid s 106(1)(b).
86 Ibid s 106(1)(b).
87 Ibid s 106(3).
88 Ibid ss 127, 135, 159.
89 Erskine May (UK Parliament) pt 1, ch 3, para 3.9.
90 RPA 1983, s 169. On the point of criminal proceedings, see generally *DPP v Edwards* [2002] EWHC 636, [2002] 3 WLUK 551, paras 4–13.
91 RPA 1983 ss 106(2), 160(4), 160(5)(b), 173(1)–(3). See also *Erskine May* (n 89 above) para 3.9.
92 Ibid s 106(1)(b). See also *Cumberland Cockermouth Division case* (1901) 5 O'M&H 155, 160.
93 *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169, (2011) 2 WLR 1362, para 111. See also paras 107–111, 114.

where there has been a lie. As argued by Horder, the notion of 'a false statement of fact in relation to the candidate's personal character or conduct'[94] notably excludes deception which is misleading. '[S]omeone might disseminate a perfectly correct claim that a candidate has been convicted of murder, whilst failing to mention that the conviction was later overturned and the candidate completely exonerated'.[95] The narrowness of the legislative drafting contributes towards ensuring that section 106 has limited use and a weakened deterrent effect.

Data from both the Electoral Commission and the law reports prove that section 106 has rarely been relied on as a legal remedy. For instance, over 900 allegations were made to the police between 2010 and 2024,[96] with 552 of the total allegations documented as not being within the scope of section 106.[97] Similarly, only a handful of electoral petitions have been brought in this time period.[98] What should be an effective mechanism which deters politicians from making such representations is not having the desired effect.

This inefficacy could be addressed if the scope of the illegal practice was widened, for instance to include other types of representations (like misleading statements) and accommodate political defamation (ie not just personal matters). On this point, what is being suggested is similar to the approach in some parts of the United States where the making of any false statement about a candidate is prohibited (eg in Colorado and Louisiana).[99] While these reforms would make section 106 more effective in addressing electoral defamation, it would not go far enough. This would only be addressing part of the problem and representations which are made to the public outside the context of

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94 RPA 1983 s 106 (1)(b).

95 Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford University Press 2022) 146.

96 Electoral Commission, 'Electoral Fraud Data 2010–2016' (Electoral Commission nd). The data is public information and available upon request to the Electoral Commission. Electoral Commission, 'Electoral Fraud Data 2017–2024' (Electoral Commission 2024).

97 Based on filtering the Electoral Commission data with the categories: 'No further action - no offence', 'No further action - not an RPA offence', 'No further action - not RPA offence', 'No further action - No offence', 'No Further Action - No offence under RPA'. Moreover, between 2010–2024 there have only been two convictions under s 106, per ibid.

98 Only eight civil actions have been brought on s 106 grounds between 2010–2024 (electoral petitions or applications for interim injunctions/interim interdicts) and few have been successful. This is based on a search of the Law Reports through the online database of Westlaw last conducted in November 2025. Note that appeals were excluded.

99 Staci Lieffring, 'First amendment and the right to lie: regulating knowingly false campaign speech after United States v Alvarez' (2013) 97(3) Minnesota Law Review 1047–1078, 1056. See fn 74 of Lieffring's article for a detailed list.

elections would be excluded. What is needed is a new mechanism to address representations which are made to the public more broadly. Specifically, this article advocates for a new specific criminal offence to complement the existing framework.

TOWARDS A NEW CRIMINAL OFFENCE

The section below begins by setting out a rough conceptualisation of what the offence should be covering. It then moves on to setting out a case in favour of it, responding to key objections such as those concerning free speech or politicisation of the judiciary.

A new specific offence for the most egregious representations

While it is beyond what can be achieved to offer a draft offence, it is necessary to offer a rough indication of what the offence should be covering. The section below provides an overview, highlighting certain features which should form the foundation of the offence.

It is argued that the remit of the criminal offence should be limited to the most egregious representations, similar to instances such as Johnson's misleading claims on post-Brexit NHS investment[100] or Blair's claim in relation to Iraq's weapons of mass destruction.[101] These are labelled as the most egregious because they embody a number of features which are indicative of greater culpability and potential for significant harm.

First and foremost, egregious instances are forms of true deceit; in other words, the politician is aware that what they are saying was false or misleading or knew that there was risk of it being so (recklessness). With these types of intention duplicity is present; the politician has made a conscious decision to engage in deception, making them worthy of blame. A politician who makes a false or misleading representation but lacks this intention (ie they have made a mistake or simply failed to do their due diligence) does not qualify as being deceptive.[102] What is significant for deceptive intent is the fact that there is a disparity between what the individual knows and what they present.

Second, the representation needs to be made by a certain type of politician. The political sphere vests the majority of its power through a chain of delegation,[103] in that power is delegated first from

100 Asthana (n 5 above).

101 BBC (n 3 above).

102 On this point, I align with the interpretations of deception in the Fraud Act 2006, sch 1, s 31, and the National Security Act 2023, sch 2, s 11.

103 Kaare Strøm, 'Delegation and accountability in parliamentary democracies' (2000) 37 European Journal of Political Research 261–289, 262.

the public (ie voters) to its elected representatives, then from some of these representatives to the Government, and finally from the Government to bureaucrats.[104] Whilst the chain of delegation is not unique to the political sphere, it is unique in the sense that the public has a much more significant role. Importantly, it is the public that first delegates political power and starts the chain reaction by participating in elections. This imposes a moral duty on politicians to behave with integrity and to refrain from making deceptive representations. While it is recognised that this moral duty exists throughout the chain, those who have a stronger nexus to that initial delegation of power, for example local councillors, Members of the House of Commons, and those who are in Government, are under the strongest obligation not to deceive. Thus, what they do should attract greater culpability compared to ordinary Members of the House of Lords (who are not in Government), civil servants or political advisors. Additionally, such roles tend to carry greater political influence and are consequently more likely to be given greater credibility by the public when they form their political preferences.

Third, the representation needs to have the potential for collectivised harm. Thus, it needs to be made to the public more broadly, or the politician needs to be aware that it will be likely to be disseminated to the public more broadly in the near future. So, this could include speeches, social media or press releases, but also radio or television interviews. The obvious exclusion to the behaviour would be speech which is covered by parliamentary privilege (on account of the need for free parliamentary debate).

Fourth, the representation needs to be a material matter of public interest – as in relevant to the public and with the potential to be influential on people's decision-making. Aside from basing the offence around features which capture a greater propensity for culpability and harm, it is suggested that it should also include an excuse for justifiable deceit to reflect some situations where the deceptive representation was required or necessitated. The classic example of this would arise in instances of national security or when secret negotiations are taking place, as was the case with Major and the IRA negotiations.[105]

104 Ibid 262. See also, Torbjörn Bergman, Wolfgang C Müller and Kaare Strøm, 'Introduction: parliamentary democracy and the chain of delegation' (2003) 37 European Journal of Political Research 255–260, 257–259.

105 Bevins et al (n 2 above).

A case for this new offence

It is appropriate to turn towards using the criminal law to address this issue, as opposed to other regulatory mechanisms, for instance parliamentary committees or ordinary regulators like the Electoral Commission. In comparison to the other options, criminalisation is more expressive and symbolic – it is, after all, the most severe expression of societal disapproval. The criminal law achieves this through a systematic and holistic reflection on the behaviour, beginning with the stigmatisation associated with criminalising. The act of criminalisation is a declaration that the state sees it as wrongful and society recognises the severity of being labelled a criminal (ie having a criminal record). Being labelled a criminal is something which needs to be disclosed in certain formal contexts (eg employment and visa applications).[106] The punishment itself then also acts as a severe form of censure.[107] Although other political and legal mechanisms do have sanctions attached (typically, political sanctions involve being sacked or forced resignation, and civil remedies involve damages, as well as the potential for reputational harm), the criminal law has a social significance and resonance[108] which other sanctions do not carry. It sends a powerful message that the conduct will not be tolerated and that if someone engages in this behaviour then they will be labelled a criminal.[109]

This expressive quality should mean that the criminal law is effective as a deterrent against more general forms of deceptive representations which are made to the public. The combination of being labelled a criminal and the sanctions imposed should mean that a significant cost is attached, thereby creating greater deterrence as regards the behaviour in question. The deterrence model is based on rational cost–benefit analysis: that is, if you increase the cost of something, less of it will be consumed. So, if you make a behaviour more costly to engage in then less of it will occur[110] because the benefit of engaging in the behaviour is outweighed by the burdens of potentially being caught and punished.[111] Of course, we also need to impose consequences which reflect the gravity of one's political deceit (retribution),[112] but the

106 A P Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011) 4.

107 Ibid 5.

108 Ibid 4, 212.

109 Ibid 4–5, 11.

110 Gordon Tullock, 'Does punishment deter crime?' (1974) 36 The Public Interest 103–111, 105.

111 Thom Brooks, *Punishment: A Critical Introduction* (2nd edn Taylor & Francis 2019) 45.

112 Ibid 48–49.

strategy of the regulation should centre around deterrence, as opposed to gearing itself towards a backward-looking response, particularly in light of the idea of protecting the public's ability to form political preferences and engage in democratic procedures.

Now, one may counter this with the argument that deterrence theory is not that successful, drawing on empirical studies to do so. For example, Anderson's survey into male prisoners and the factors influencing their offending suggests that most criminals do not contemplate the potential effect of the criminal behaviour before engaging in it. He notes that '76% of active criminals and 89% of the most violent criminals either perceive no risk of apprehension or are incognizant of the likely punishments for their crimes'.[113] With that being said, there is evidence to suggest that the success of deterrence theory varies by context, with a propensity for it to be more effective in cases of minor or administrative crime when individuals undertake rational choice theory before the act, namely, weighing the risks up against the benefits. Dölling and colleagues' meta-analysis of 700 studies[114] notes that the effect of the deterrence model varies by type of crime. They comment that 'statistically significant estimations [are] ... to be found [in minor crimes like] ... traffic offences, whereas the deterrence hypothesis is rarely confirmed in the case of more serious offences'. They attribute this to the role of rational choice, which is more prevalent in minor offences, whereas major crimes are often characterised by expression, for example emotion and spontaneity which often do not give the opportunity for rational thinking and a risk assessment.[115] Similar findings can be seen in Abramovaite and colleagues'[116] analysis of police forces and the reduction of theft, burglary and violence in England and Wales. Yes, increasing the certainty of punishment (measured by increased police detections) was associated with a reduction in non-expressive crimes like theft and burglary, but it did not have the same effect on violent crime.

Now, deceptive representations are not crimes characterised by emotion or spontaneity so they are an act which would naturally lend themselves towards a risk assessment. Further, once the politician engages in the risk assessment there are a number of factors that

113 David A Anderson, 'The deterrence hypothesis and picking pockets at the pickpocket's hanging' (2002) 4(2) American Law and Economics Review 295–313, 295.

114 Dieter Dölling et al, 'Is deterrence effective? Results of a meta-analysis of punishment' (2009) 15 European Journal on Criminal Policy Research 201–224, 214–215.

115 Ibid 215. See also Anderson (n 113 above) 295, 298, 301–304.

116 Juste Abramovaite et al, 'Classical deterrence theory revisited: an empirical analysis of police force areas in England and Wales' (2023) 20(5) European Journal of Criminology 1663–1680, 1663.

would colour their perception. First, a politician is likely aware of the risks and penalties attached to the offence, so will be well informed of the potential costs and fully understand the implications of getting caught.[117] Second, politicians have a high social and economic status which should mean that they have more to lose if they engage in criminal acts.[118] Those 'persons who receive relatively few rewards from the society, whether economic or social, would tend to place a greater value on the potential rewards for criminal activity'. Conversely, those who receive more rewards will perceive greater informal costs[119] from engaging in the behaviour such as loss of status and prestige. In particular, the publicity that is associated with the role and the long-term effect on career and livelihood that being caught may have[120] are notable costs and should help to act as significant deterrents. Furthermore, a conviction of this nature would be career-ending, so there should be no potential of the costs becoming less significant or repeated offending.[121]

Of course, prosecution comes with a risk of unintended political consequences, for example, the offence could be weaponised. In the past, there have been instances where the prosecution of a politician has done little to dampen the support they receive (as can be seen in the case of John Wilkes[122] and with Alternative für Deutschland politicians in Germany).[123] In fact, it may actually result in them gaining an influx of supporters, and it is thus feasible that some politicians may misuse the law by intentionally making deceptive representations, with the aim of being prosecuted, becoming a so-called martyr, and generating publicity for their political cause. With that said, this is not a very likely possibility because doing so would require a great deal of self-sacrifice. As said above, the ramifications for career and livelihood from being

117 Paul H Robinson and John M Darley, 'Does criminal law deter? A behavioural science investigation' (2004) 24(2) Oxford Journal of Legal Studies 173–205, 176.

118 Michael R Geerken and Walter R Gove, 'Deterrence: some theoretical considerations' (1975) 9(3) Law Society Review 497–513, 498, 507.

119 Ibid 508.

120 Ibid 497, 503–508.

121 David Weisburd, Elin Waring and Ellen Chayet, 'Specific deterrence in a sample of offenders convicted of white collar crimes' (1995) 33(4) Criminology 587–607, 587, 593–597.

122 'John Wilkes – Liberty & Parliament' (*UK Parliament* 2025).

123 Deborah Cole, 'German spy agency labels AfD as "confirmed rightwing extremist" force' (*The Guardian* 2 May 2025). Per Cole: 'The AfD has faced growing calls from opponents for it to be outlawed on the grounds that it seeks to undermine democratic values, including protection of minority rights. … But Olaf Scholz, the outgoing Social Democrat chancellor, warned against rushing to outlaw the AfD. Some opponents of a ban say it could backfire and help promote a victim narrative within the party.'

found guilty of a criminal offence should be sufficiently significant so as to outweigh the potential benefits – publicity, for example. Again, this should deter politicians from making deceptive representations, regardless of their motivations.

The overarching point here is that the criminal law would be effective in reducing the number of politicians who make deceptive representations. It has a resonance and deterrence effect which is unique. With that being said, there are a number of objections which could be raised in response to my suggestion of using the criminal law. The rest of this article will involve examining and addressing the most frequently raised objections, seeking to highlight the appeal of a new specific offence.

The first objection which could be levied at criminalisation is one that may be termed the legislative objection. What is meant by this is that it would require the very people who the Act would be restricting to support its passage. Admittedly, Parliament has traditionally been unwilling to support the passage of similar legislation. For instance, there have been attempts to pass Bills making it illegal for politicians to make deceptive statements – the Elected Representative (Prohibition of Deception) Bill was introduced in 2006 and then again with minor changes in 2023. Both times the Bills failed to get a second reading. Whilst the validity of the self-interest objection can be readily appreciated, there is reason to believe that Parliament could support a new and different offence. The offence set out in this article is significantly narrower compared to the one in either of the Elected Representative Bills. Even in the rough outline provided, there are extra conditions of materiality and a broader justifiability defence. As the offence will have less general applicability, it should be more appealing to those in Parliament.

With that being said, there is evidence to suggest that Parliament can set aside its self-interest. What is particularly indicative is the recent move by the Welsh Government committing to making lying in politics illegal.[124] Although what this would entail is unknown (the legislation has not been drafted), the fact that politicians are willing to commit to it and support its passage suggests that the prospect that Parliament could introduce an Act to criminalise this behaviour is a realistic one. Setting aside these more specific reasons, it is important to stress that most British politicians are answerable to the public. If the public feels that their current representatives are not serving their interests and supporting legislation that the public wants, then politicians could lose political power at the next election. Therefore, if enough public pressure is exerted and expressed in favour of a Bill to address this

124 Steven Morris, 'Welsh Government commits to making lying in politics illegal' (*The Guardian* 2 July 2024).

issue, then politicians would be forced to support it because a failure to do so would risk their political power.

Another possible objection is what this article terms the politicisation objection: as in the argument that creating a criminal offence to address political deceit would encourage the judiciary to become overly involved in political matters when these institutions should be kept separate. Whilst the validity of this objection can be appreciated, this piece is advocating for a narrow offence. It would only involve expanding the judiciary's role in addressing political behaviour to a small degree. Indeed, the UK already has a number of criminal provisions which regulate certain behaviours from our political representatives and public figures. But these offences are all narrow in scope. Again, it is important to acknowledge section 106 of the RPA 1983 as well as other offences, such as bribery[125] and various provisions which relate to election expenses.[126] On a related note, we already have criminal offences for promulgating false information (as with section 179 of the Online Safety Act 2023) which is also narrowly drafted. The key point is that the law already addresses other deceptive and political issues and has not been brought into disrepute. If we consider this in light of the fact that the offence would be narrow and not something which the courts would encounter every day then the judicial role would not be extended very much and would not be likely to influence public perceptions as to judicial independence.

One may respond to this and ask whether the offence would have much of an impact. This article completely acknowledges that the offence is quite narrow and would have limited applicability. The purpose of the offence is not to address deceptive representations more broadly or to be used frequently. Rather, it is more narrowly drafted so as to only address the most egregious representations and the most clear-cut cases. This is actually beneficial and would aid in avoiding encouragement of a culture of secrecy and lack of transparency.[127] Nonetheless, it is important not to overstate the narrowness of the offence. This article is not advocating for the introduction of something which is as narrowly drafted as section 106 currently is (eg dependent on the demonstration of a number of very specific contingencies, such as a certain time period or type of representation). Such an approach to drafting would be problematic because it would offer little coverage. As such, prosecutions would be unlikely, and the deterrence-effect would be diminished.

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125 Bribery Act 2010, ss 1–2, 6. See also RPA 1983, s 113, for bribery in the context of voting.

126 RPA 1983, ss 72–90D.

127 Horder (n 95 above) ch 1.1.

Another potential objection is that using the criminal justice system comes with certain enforceability challenges. For instance, the Crown Prosecution Service (CPS) requires there to be a realistic possibility of conviction and it to be in the public interest before proceeding with prosecution. Then, if prosecution is pursued, court proceedings can take a long time by which point the damage is done. Again, it is recognised that this is a valid point. However, this seems to be a natural limitation of using the criminal justice system to address any type of behaviour. While these are issues with its operation, these are widespread issues with the criminal justice system as a whole. It does not mean is that we should not introduce new criminal offences simply because the threshold is high and the system is slow. It is also worth emphasising that the suggestion is not to introduce a new offence that would produce a disproportionate strain on the system. The whole point of the offence would be to introduce something which would not lead to a deluge of cases, overly burdening an already burdened system.

A further objection is that this offence may be subject to exploitation. There is potential for politicians and politically minded members of the public to make false allegations with the aim of discrediting politicians. The fact that this is a possibility can be accepted. However, people would be deterred from making false allegations because they could be prosecuted for wasting police time, an offence which carries a potential prison sentence.[128] Setting this reason aside, it is also important to bear in mind that the unfoundedness of the allegation would be exposed through investigation. The unfortunate by-product is that the reputations of the investigating body and CPS could be damaged. Even if the decisions to close the investigation or the lack of prosecution are 'bona fide', the decision may still appear to be politically motivated, opening the body up to criticism.[129] However, similar to the point made immediately above, these are widespread issues with using the criminal justice system. All decisions are open to critique and public backlash, but what that does not mean is that we should not introduce new criminal offences simply because there is potential for criticism of the state bodies involved. Instead, there should be focus on reducing this criticism by informing the public of the rationale behind the decision.

In a similar vein, another objection which could be posed is that this offence may be subject to abuse, stifling genuine political debate or opposition to government policies.[130] By analogy, we can refer to other countries such as Vietnam and Thailand where fake news laws have been

128 Criminal Law Act 1967, s 5(2).

129 Jeremy Horder, 'Online free speech and the suppression of false political claims' (2021) 8(1) Journal of International and Comparative Law 15–52, 29.

130 Ibid 34–35.

exploited, and increasingly repressive legislation has been introduced so as to curtail the broader public debate.[131] While it is recognised that this is a possibility, it is important to stress that this article is proposing one relatively narrow offence. It is not intended to be part of a regulatory spree against political speech, nor is it supposed to be the start of an escalation in repressive laws. Although there is nothing preventing the Government from proposing such legislation, existing scrutinisation and checking mechanisms would hopefully prevent these from being enacted. The House of Commons, for example, could vote against passing the Bill through to the next stage. In the unlikely event that further laws were passed, they would need to be compatible with our freedom of speech obligations. As discussed in further detail below, repressive laws on speech would likely be inconsistent with these obligations, resulting in a judgment of incompatibility from the European Court of Human Rights (ECtHR) and potential repeal. Thus, not only is it not the aim of this article to argue for legislation beyond this offence but there are also multiple safeguards and actors in place which make the possibility of more substantial curtailment of the political debate unlikely.

The final objection which could be levied at criminalising certain types of political deceit is the free speech critique. One could argue that criminalising a type of political speech would be at odds with our international obligations under the European Convention on Human Rights (ECHR) and ECtHR jurisprudence. While it is important to recognise the value of free speech, this article does not agree with the sentiment that criminalising this type of political speech would be a violation.

Under article 10 of the ECHR[132] there is a general guarantee afforded to free expression. Political expression is guarded even more fervently with states having less capacity for interference. This is reflected in the ECtHR case law in which the court has traditionally been very reluctant to accept interferences. It has offered protection to an entire spectrum of political speech from information or ideas which are favourably received to those which are indifferent and even to

131 On this point parallels can be drawn with Thailand and Vietnam where fake news laws have become increasingly oppressive and used to inhibit genuine political debate or peaceful protests. See Amnesty International, 'Thailand: authorities using repressive laws to intensify crackdown on online critics' (*Amnesty International* 23 April 2020); Gov.UK, 'Country policy and information note: opposition to the state, Vietnam' (*Gov.UK* updated 22 September 2025).

132 European Convention on Human Rights 1950, art 10.

those which offend, shock or disturb.[133] Thus, not only have relatively straightforward types of political speech been protected (such as ideas which challenge the current institutional order),[134] but also more controversial and offensive types such as where a political applicant has engaged in hateful, hostile or offensive rhetoric.[135]

More importantly for the purposes of this article, ECtHR jurisprudence seems to support the fact that article 10 protection extends to making false political claims. The pertinence of this is clearly illustrated by *Salov v Ukraine*.[136] In this case Mr Salov (the applicant) disseminated incorrect information about the alleged death of a presidential candidate, thereby breaching article 127 of Ukraine's Criminal Code by interfering with 'electoral rights, or ... with the activity of an electoral commission, for the purpose of influencing election results'.[137] He was convicted of the offence and received criminal penalties.[138]

Although the Court determined that there was an illegitimate interference with article 10, it is important to appreciate the application of the test under article 10(2). Identifying where the measure failed to meet the test highlights the appeal and likely compatibility of the offence proposed in this article. The Court found that the state managed to satisfy the first two limbs of the test. The legislation under article 127 was sufficiently foreseeable and clear so as to allow an individual to see the consequences of their behaviour.[139] Furthermore, safeguarding against false or misleading political information falls under the legitimate aim[140] of protecting the public's engagement with the democratic processes (such as choosing a presidential candidate).[141]

While the first two limbs were met with ease, the interference failed on the latter part of the test: being necessary in a democratic society

133 *Eğitim ve Bilim Emekçileri Sendikası v Turkey* App no 20641/05 (ECtHR 25 September 2012) para 67, citing *Handyside v United Kingdom* App no 5493/72 (ECtHR 7 December 1976) para 49, and *Jersild v Denmark* App no 15890/89 (ECtHR 23 September 1994) para 37.

134 *Eğitim ve Bilim Emekçileri Sendikası* (n 133 above) paras 70–74.

135 See, for instance, *Jersild v Denmark, Gündüz v Turkey* App no 35071/97 (ECtHR 4 December 2003); *Erbakan v Turkey* App no 59405/00 (ECtHR 6 July 2006).

136 *Salov v Ukraine* App no 65518/01 (ECtHR 6 September 2005).

137 Criminal Code of Ukraine, art 127.

138 *Salov* (n 136 above) paras 10–32.

139 Ibid paras 108–110.

140 Ibid para 110. See also *Ahmed and Others v the United Kingdom* App no 65/1997/849/1056 (ECtHR 2 September 1998) para 52 where the Court stressed the importance of ensuring the free will of the people during elections and the need to protect democratic society from interferences.

141 Ibid para 101.

and proportionate to the aim pursued.[142] In relation to necessity, the Court drew particular attention to the nature of the speech in question, noting the fact that the information was not produced or published by the defendant. Instead, it was a personalised assessment, had limited impact, and lacked evidence of being made with deceitful intention[143] (characteristics which are indicative of lower culpability and less potential for harm). Taking these characteristics into account, the Court judged that there was no need for the interference.[144] Another issue was that the measure was disproportionate to the aim pursued. In particular, the nature and severity of the penalties imposed far outweighed the aim of ensuring the democratic process.[145] In this case, Mr Salov was given a sentence of five years (which was suspended for two), a fine, and annulment by the Bar Association of the applicant's licence to practise law.

Now, it is important to stress that this article agrees with the Court's approach in *Salov*: for that particular speech the measure was unnecessary and the sanctions imposed disproportionate.[146] However, this case can be interpreted as suggesting that there *may* be circumstances in which political deceit may in fact be criminalised in a way which is compatible with article 10(2).[147] The issue of proportionality may be resolved by being more cautious with sanctions, for example imposing fines or community orders as opposed to imprisonment. One may counter that using lesser sanctions may undermine the deterrent effect which this article seeks to create. After all, if you attach sanctions which are less severe, then the risk assessment will be influenced. Nevertheless, the deterrence effect should remain intact. Irrespective of sanctions attached to the offence, a conviction carries a significance and resonance. Thus, the potential of being charged and convicted of a criminal offence should act as a significant disincentive and maintain the strong deterrent effect.

The problem of necessity requires more work. This article fully admits that not all low-value speech (such as false or deceitful political rhetoric) poses such a significant threat to the democratic process as to necessitate criminalisation. However, the Court's approach may be different if there was a change in the nature of the deceit. Say, for example, the individual was more culpable, or the deception had more potential for harm. While this is something which was not met by the facts in *Salov*, the reasoning underpinning the judgment suggests that

142 Ibid para 116.
143 Ibid paras 113–116.
144 Ibid para 113.
145 Ibid para 115.
146 Ibid paras 110–113.
147 See Coe's different interpretation of the case in Coe (n 33 above) 222–223.

the presence of these factors may sway the assessment of interference with article 10.[148] The point to be taken is that the offence would need to be more discerning with what it addresses compared to *Salov*. This is something which the offence proposed in this article achieves. It is narrowly drafted and only seeks to address the instances of deceit which are indicative of higher levels of culpability and potential for harm (the most egregious). In turn, it is more likely to satisfy the requirement of necessity and so an offence which is drafted in this way would be unlikely to compromise article 10.

CONCLUSION

Recent political scandals such as statements made regarding Brexit and Partygate have exposed the regular use of deceptive representations by our politicians. This revelation invites questions about the suitability of the current state of affairs, both in terms of what the UK's approach is to addressing deceptive representations and whether it is fully fit for purpose. An assessment of the UK's position highlights how the framework is not sufficient. The argument put forward here is that a new response is needed to help ensure that the public's formation of political preferences and democratic participation is based on truthful information. Specifically, this article advocates for a new measure to complement what is already in place, suggesting that the most effective way to do this would be to introduce a new criminal offence. Even though prior attempts have been unsuccessful, there is great value in employing the criminal law to deter politicians from making deceptive representations. A careful exploration of the objections which criminalisation often encounters demonstrates that a new approach would be more appropriate. This article advocates for a narrower criminal offence compared to what has previously been attempted, specifically arguing for one which targets the most egregious representations. It emphasises its potential as an effective deterrent as well as a feasible course of action. With legislative reform of deceptive political speech now being seriously considered (at least in Wales),[149] it is worthwhile reflecting on the untapped potential of a criminal offence.

148 See similar points being made about a more discerning threshold in the US context in Lieffring (n 99 above) 1061–1076.

149 Eg Morris (n 124 above).