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MacDermott Lecture 2022: Democracy, expression and the law in our digital age

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INTRODUCTION

It is a real honour, both professionally and personally, to have been asked to join you this evening to deliver the School of Law's annual MacDermott Lecture. I will leave to my closing remarks the reason for the very personal pleasure I derive from this invitation to speak in Belfast.

In his inaugural lecture 50 years ago, Lord MacDermott emphasised the fact that the 'vitality and fortunes of a people are closely linked to the quality of their laws'. He urged members of the legal community to scrutinise from time to time the health and condition of principal legal concepts with a view to safeguarding the common good or, as he said, 'common weal'.[1] It is with this in mind that I chose this topic.[2]

The Strasbourg Court has consistently held that democracy constitutes a fundamental element of the 'European public order'.[3] If we had lost sight of the fact that the maintenance and further realisation of human rights and fundamental freedoms are best ensured, on the one hand, by an effective political democracy and, on the other, by a common understanding and observance of human rights, then the tragic events unfolding in Ukraine since February have reminded us of the importance of what our forebearers fought so hard for. In the words of the UK representative drafting the Convention, in a speech delivered on 8 September 1949:

> The Convention was to … ensure that the states of the Members of the Council of Europe *are* democratic and *remain* democratic.[4]

* Delivered as the 50th Annual MacDermott Lecture at Queen's University Belfast on 28 April 2022. My thanks to the School of Law, the legal community in Belfast and the MacDermott family for their warm welcome. The views expressed are personal to the author.

1 Lord MacDermott, 'The decline of the rule of law' (1972) 23 Northern Ireland Law Quarterly 475.

2 It is, moreover, a topic of global and growing concern. See, just a few days before the Belfast lecture, the speech of Barack Obama, 'Technology and democracy' delivered at Stanford University on 22 April 2022.

3 *Zdanoka v Latvia* [GC], no 58278/00, 16 March 2006, § 98.

4 Coll Ed, II, 60 (emphasis added).

Over the last two decades, advances in information and communications technology have been critical to facilitating access to information and the free flow of ideas prior to and during elections. Few in our orbit would contest what the Strasbourg court and other national courts have oft-repeated; to quote Lord Steyn, 'freedom of speech is the lifeblood of democracy'.[5] And few ignore the potential of the internet and social media to enhance its supply. In the words of the Strasbourg court in a 2012 Turkish case called *Ahmet Yildirim*, which involved the blocking of access to Google websites:

> In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general.[6]

However, it is now well-established that state and non-state actors exploit technological advances to alter what and how information reaches the electorate and, in some cases, to interfere with democratic participation and access to information during election periods and beyond.[7]

In a remarkably short space of time, a variety of new words have made their way into our democratic lexicon – fake news, junk news, disinformation and 'alternative facts', to name but a few. The *Oxford English Dictionary* word of the year in 2016 – a year whose political significance needs no explaining – was 'post-truth', defined as follows:

> relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.

Commentators writing during the last United States (US) Presidential election referred to 'lie machines', consisting of the governments and political campaigns that produce lies alongside the social media platforms, algorithms and bots that distribute them. These machines attack not just individual targets but also:

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5 *R v Secretary of State for the Home Department ex parte Simms* (2000) 2 AC 115 HL at 126: 'Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.'

6 *Ahmet Yildirim v Turkey*, no 3111/10, § 48, 18 December 2012.

7 See the report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Freedom of Expression and Elections in the Digital Age* (2019) Research Paper 1/2019.

> the liberal epistemic order, political systems which place trust in essential custodians of factual authority, including science, …, journalists, public administration and the justice system.[8]

A 2019 Chatham House report emphasises that disinformation in elections is part of a broader problem, evident subsequently during the pandemic, resulting from the spread of disinformation in day-to-day online discourse:

> [This] has encouraged tribalism and a polarization of views on a wide range of societal issues … [and t]his polarization feeds into voters' preferences in elections and into the tenor and content of political debate.[9]

Turning to the 70-year-old European Convention, Article 3 of Protocol no 1 provides that:

> The High Contracting Parties undertake to hold free elections … by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Rory O'Connell, at Ulster University, has studied electoral rights under the Convention.[10] As he outlines in a most accessible way, Strasbourg case law on Article 3 of Protocol no 1 covers a wide range of different issues, not least what constitutes a legislative body, the Convention compliance of conditions of access to voting, the organisation of elections or election campaigns and the processing of electoral results.[11]

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8 See the review of T Rid, *The Secret History of Disinformation and Political Warfare* (Farrar, Straus & Giraux 2020) by J Freedland, 'Disinformed to death' (2020) *New York Review of Books*.

9 See K Jones, 'Online disinformation and political discourse: applying a human rights framework' (2019) Chatham House, Royal Institute of International Affairs, 8.

10 R O'Connell, Law, *Democracy and the European Court of Human Rights* (Cambridge University Press 2020).

11 See, for examples, in this order, *Matthews v the United Kingdom* [GC], no 24833/94, §§ 45–54, 18 February 1999 (on the European Parliament as a legislature); *Hirst v the United Kingdom (No 2)* [GC], no 74025/01, § 62, 6 October 2005 (on the right to vote of prisoners); *Shindler v the United Kingdom*, no 19840/09, 7 May 2013 (justifiable restrictions on voting rights of non-resident citizens); *Sejdić and Finci v Bosnia-Herzegovina* [GC], nos 27996/06 and 34836/06, 22 December 2009 (rule excluding the eligibility to stand for election of persons who refused to declare affiliation with a 'constituent people'); *Bowman v the United Kingdom*, no 141/1996/760/961, § 42, 19 February 1998, (on interaction with Article 10 and the importance in the period preceding an election for opinions and information of all kinds to be permitted to circulate freely – discussed further below); *Davydov v Russia*, no 75947/11, 30 May 2017 (on post-election periods, including the counting of votes and the recording and transmission of the results) and *Petkov and Others v Bulgaria*, nos 77568/01, 178/02 and 505/02, 11 June 2009 (on the need for effective remedies in electoral disputes).

Most cases have not been as controversial as the *Hirst* ruling on prisoners' voting rights[12] and most have proved essential to protecting what in this day and age has become a remarkably undervalued right integral to the peaceful coexistence at European level of democratic societies based on the rule of law.

What is striking about the cases in this field is that one still finds few if any references to the words digital, technology, electronic, internet or social media in the Strasbourg case law on free elections. The votes and elections which have been the subject of the court's case law thus far have been votes cast physically, in elections organised in bricks and mortar polling stations, after election campaigns which have followed traditional lines and have been subject to traditional rules, such as a ban on campaigning in the physical vicinity of a polling station or in the hours or days before voting. Yet, looking at the recent US elections or, closer to home, at recent referenda in the two parts of this island, we know that this is no longer the only, or perhaps even the predominant way in which 'the People's approval' is sought or captured nowadays.

I propose this evening to provide a brief overview of Strasbourg case law on free elections and closely related case law under Article 10 on political speech and campaigning. Thereafter it becomes a little more delicate. Like any sitting judge asked to give a public address, I have to balance my own vow of discretion with your understandable desire not to be bored stiff this evening. In a speech on law and politics delivered by a judge, a delicate line has to be tread. I propose:

i to ask whether and where there may be gaps in existing Strasbourg case law when it comes to the type of electoral and expression questions which now arise, and

ii to question whether some of the underlying philosophy which has informed Strasbourg case law to date may be ripe for reconsideration.

STRASBOURG CASE LAW ON THE INTERPLAY BETWEEN FREEDOM OF EXPRESSION AND THE RIGHT TO FREE ELECTIONS

The court has consistently held that there is little scope under Article 10 § 2 of the Convention for restrictions on political expression.[13] It has

12 See *Hirst (No 2)* (n 11 above). The UK was not alone in resisting changes to its electoral laws on prisoner voting. See also *Anchugov and Gladkov v Russia*, no 11157/04, judgment of 4 July 2013, discussed in G Bogush and A Padskocimaite, 'Case closed, but what about the execution of the judgment? The closure of *Anchugov and Gladkov v Russia*' (*Ejil Talk!* 30 October 2019).

13 See, for instance, *Perinçek v Switzerland* [GC], no 27510/08, § 197, 15 October 2015 (extracts).

generally allowed states only a narrow, indeed very narrow, margin of appreciation in this field. This is because of the particular importance the Convention and contracting parties attach to free political debate.[14]

The interplay between expression rights guaranteed under Article 10 of the Convention and those under Article 3 of Protocol no 1 was summed up in a Belgian case from the 1980s – *Mathieu-Mohin*. At issue in that case was the complex system of governance set up to accommodate the coexistence of three linguistic communities in Belgium. In it the court emphasised the basic premise which it has repeated in decades of case law spanning 47 different states and numerous electoral disputes ever since:

> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system.[15]

Between these two interrelated articles, however, one finds a fundamental distinction. The narrow margin of appreciation which generally applies to political expression contrasts with the wider margin which prevails as regards the right to free elections. This wider margin is understandable. For the purposes of Article 3 of Protocol no 1, the court assesses electoral systems in the light of the political evolution of the country concerned. It recognises that features that would be unacceptable in the context of one system may be justified in the context of another, so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'.

A very good example of how the margin operates with reference to local history, experience and domestic context in the electoral field is provided in the Northern Irish case of *Lindsay v the United Kingdom*.[16] There the European Commission of Human Rights examined and upheld the legitimacy of adopting a different voting system (proportional representation) for Northern Ireland to that pertaining

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14 See *Féret v Belgium*, no 15615/07, § 63, 16 July 2009.

15 *Mathieu-Mohin and Clerfayt v Belgium*, no 9267/81, § 47, 2 March 1987. See, for further discussion, R Mastroianni, 'Fake news, free speech and democracy: a (bad) lesson from Italy?' (2019) 25 South Western Journal of International Law 42, 45, who argues that an election process is 'free' if the electorate's choice is based on its access to or receipt of a wide range of proposals and ideas and if false information does not distort or alter election results.

16 *Lindsay v the United Kingdom (dec)*, no 8364/78, 8 March 1979.

in the rest of the United Kingdom (UK) (first past the post).[17] Leaving aside the question whether, in 1979, the European Parliament could be regarded as a 'legislature', the Commission emphasised that Article 3 of Protocol no 1 does not impose a particular kind of electoral system. It concluded that the choice of:

> a system taking into account the specific situation as the majority and minority existing in Northern Ireland must be seen as making it easier for the people to express its opinion freely.

Another reason for the difference in approach to Article 3 of Protocol no 1 compared to Article 10 is that the former is not just about the protection of *individual rights*, it is also about the protection of the integrity of the *electoral system* within which individual rights are exercised.[18] As the court has recognised in its case law since *Mathieu-Mohin*, electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other. On the one hand, they seek to reflect fairly and faithfully the opinions of the people and, on the other, they seek to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will.[19] The requirement under the Convention that provision is made for 'free elections' thus implies, apart from freedom of expression, the principle of equality of treatment of all citizens in the exercise of their right to vote.[20] Most member states of the Council of Europe have rules on paid political advertising. Their aim is to maintain the integrity, fairness and legitimacy of the election process and outcome, and to guard against the possibility that private interests and powerful minorities can control those outcomes. Until now, these rules have tended to be

17 See also *Mugemangango v Belgium* [GC], no 310/15, judgment of 10 July 2020, § 73. In many European states, not least the UK and Ireland, legislation regulating broadcasting may have traditionally favoured equality of political opportunity at the expense of freedom of expression whereas in the US, in relation to legislation which placed limitations on campaign expenditure, the US Supreme Court has held that: 'the concept that the Government may restrict the speech of some in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment' (*Buckley v Valeo* 424 US 1 (1976) at 48–49 *per curiam* opinion). See further *Austin v Michigan State Chamber of Commerce*, 494 US 652 (1990).

18 See further O'Connell, cited above, ch 9: 'Regulation of elections', and cases like *Saccomanno and Others v Italy*, no 11583/08, 13 March 2012, where the court referred at § 47 to a right to have the benefit of legislative elections conforming to Article 3 of Protocol no 1 principles.

19 See *Mathieu-Mohin* (n 15 above) § 54.

20 Ibid.

scattered across a variety of election laws, broadcasting law and self-regulatory codes.[21]

Two contrasting cases, both of which originated in the UK, are illustrative of how and in what context the Convention approach to political speech and campaigning has developed and of the interplay between Articles 10 and 3 of Protocol no 1. The applicant in the first case – *Bowman v the United Kingdom* – was the executive director of the Society for the Protection of Unborn Children. She arranged to have some 1.5 million leaflets distributed in different constituencies in support of pro-life candidates.[22] As a result of this she was charged with an offence under the Representation of the People Act which prohibited expenditure above a certain limit by an unauthorised person during the period before an election. The flavour of the court's case law on the intersection between free elections and freedom of expression is on display in the *Bowman* judgment, handed down in 1998.[23] The court considered that it is particularly important in the period preceding an election that opinions and information *of all kinds* are permitted to circulate freely. Nonetheless, it also recognised that in certain circumstances the two rights may come into conflict. It accepted that, *in the period preceding or during an election*, it may be necessary to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression. In the *Bowman* case the court held that the relevant provision of the UK statute, operated, for all practical purposes, as a total barrier to the applicant publishing

21 As regards electoral law, the main ways campaign communication has been regulated until now has been through **a.** spending limits and campaign finance controls, **b.** subsidies for campaigning communications, **c.** pre-poll black outs, **d.** media regulation and, in particular, broadcast licensing, **e.** rules on political advertising and **f.** self-regulation and journalism ethics. For an overview, see Council of Europe, *Study on the Use of the Internet in Electoral Campaigns*, DGI (2017) April 2018.

22 See *Bowman v United Kingdom*, no 24839/94, 19 February 1998.

23 See ibid § 42 citing *Mathieu-Mohin* (n 15 above) § 47, and *Lingens v Austria*, no 9815/82, §§ 41–42, 8 July 1986 ('freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention'). See also the General Comment No 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service under Article 25 of the Covenant, UN Doc CCPR/21/Rev1/Add7, 12 July 1996.

factually accurate information with a view to influencing the voters and it found a violation.[24]

The second judgment of interest, which dates from 2013, is *Animal Defenders International*.[25] In that case a non-governmental organisation (NGO) was refused permission to place a TV advert as part of a campaign concerning the treatment of primates. This was due to a statutory prohibition of political advertising whose aim was to maintain impartiality in the broadcast media and to prevent powerful groups from buying influence through airtime. The prohibition applied not only to advertisements with a political content but also to bodies which were wholly or mainly of a political nature, irrespective of the content of their advertisements. The decision of the British regulatory authority (the Broadcast Advertising Clearance Centre or BACC) to refuse to clear the advert,[26] had been upheld by the High Court and the House of Lords, with the latter holding in 2008 that the statutory prohibition was justified by the aim of preventing government and its policies from being distorted by the highest spender.

How would the Strasbourg court react, given its dislike of blanket bans and previous Article 10 case law which had found violations in very similar circumstances? When determining the proportionality of such a general legislative measure, the court in *Animal Defenders International* attached considerable weight to the fact that the complex regulatory regime chosen to govern political broadcasting in the UK had been subjected to exacting and pertinent reviews by both parliamentary and judicial bodies. The disputed legislation was the culmination of an exceptional examination of the cultural, political and legal aspects of the prohibition and its proportionality had been debated in detail in

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24 The court was not satisfied that the £5 sterling expenditure threshold had been necessary to achieve the legitimate aim of securing equality between candidates. There were no restrictions, it noted, placed upon the freedom of the press to support or oppose the election of any particular candidate or upon political parties and their supporters to advertise at national or regional level, provided certain conditions were fulfilled – *Bowman* (n 22 above) § 47. Six judges dissented and the majority judgment was subject to quite critical legal commentary. Judge Valticos, dissenting, indicated at the time that there was 'something slightly ridiculous in seeking to give the British Government lessons in how to hold elections and run a democracy'. Professor Conor Gearty, in contrast, criticised the majority's reluctance 'to recognise the debilitating effect of disproportionate financial resources' ('Democracy and human rights in the European Court of Human Rights: a critical appraisal' (2000) 51 Northern Ireland Legal Quarterly 381, at 394).

25 *Animal Defenders International v the United Kingdom*, no 48876/08, 22 April 2013.

26 The BACC held that the political nature of the applicant NGO's objectives meant that the broadcasting of the advert was caught by the prohibition in s 321(2) of the Communications Act 2003.

the High Court and the House of Lords.[27] The outcome in this case was, however, far from uncontested, as the finding of no violation by nine votes to eight laid bare.

The case raised a question which has worried national courts and divided commentators, and which I will touch on below, namely the proper role of courts as overseers of democratic procedure.[28] Speaking as an international court which plays a subsidiary and external role, the Strasbourg court in *Animal Defenders* located the most appropriate place for the necessary balancing to occur at national parliamentary and, if necessary, national judicial level; on condition of course that the review at both levels was of a certain quality.

Apart from this important expression of subsidiarity and respect for parliamentary processes which one finds in the Grand Chamber judgment, another aspect of *Animal Defenders* is particularly pertinent for the purposes of our discussion. The impugned prohibition applied only to paid, political advertising and it was confined to radio and television. On the one hand, the targeted nature of the prohibition fed positively into the court's proportionality assessment. On the other hand, however, the applicant NGO had contested the rationale underlying this targeted legislative choice, which it considered illogical given the comparative potency of newer media such as the internet. In its 2013 judgment, the court emphasised the particular influence of the broadcast media and held:

> Notwithstanding ... the significant development of the internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the [UK] to undermine the need for special measures for the latter.[29]

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27 The line adopted by the court in the UK case was reminiscent of that it had taken in *Murphy v Ireland* in relation to the prohibition of broadcast religious advertisements (application no 44179/98, § 75, 10 July 2003). Contrast *Animal Defenders* (n 25 above), however, with the violation of Article 10 of the Convention previously found in *VgT Verein gegen Tierfabriken v Switzerland*, no 24699/94, 28 June 2001, which had concerned a similar ban of a general nature on political advertising on the broadcast media, or the judgment in *TV Vest As & Rogaland Pensjonistparti v Norway*, no 21132/05, 11 December 2008, where similarly a violation of Article 10 had been found. Interestingly, both the Irish and UK Governments had intervened in the latter case arguing for a wider margin of appreciation, along the lines of that which had been accorded in the religious context in *Murphy*.

28 See further F Schauer, 'Judicial review and the devices of democracy' (1994) 94 Columbia Law Review 1326.

29 *Animal Defenders* (n 25 above) § 119. See the alternative view expressed by Judges Tulkens, Spielmann and Laffranque at § 11 of their dissenting opinion in *Animal Defenders*: 'Information obtained through the use of the Internet and social networks is gradually having the same impact, if not more, as broadcasted information. Their development in recent years undoubtedly signals a sufficiently serious shift in the influence of traditional broadcasting media to undermine the need to apply special measures to the latter.'

Leaving aside whether this distinction between traditional and new media was tenable even in 2013, fast forward nine years and it seems unlikely that the court could reason in a similar vein nowadays.

Before I end this brief overview, one final aspect of Article 10 case law is worth recalling. That provision recognises the essential role played by the press in a democratic society. The court has consistently held that:

> The *duty* of the press is to impart … information and ideas on all matters of public interest. The public's right is to receive that information.[30]

Because of this, members of the broadcast and print media have been regarded as playing a vital 'public watchdog' role. In this capacity, they are the recipients of a right granted heightened protection, but also the bearers of important duties and responsibilities.[31]

THE UNDERLYING PHILOSOPHY OF CONVENTION CASE LAW ON ELECTORAL AND EXPRESSION RIGHTS: ADAPTING TO A DIGITALISED WORLD?

When analysing restrictions of the right to freedom of expression, the court follows the well-trodden methodological path laid out in Article 10: has there been an interference, is that interference provided by law and is it necessary in a democratic society?

In a case called *MKKP v Hungary*, the Strasbourg court got its first taste in 2020 of the use of new technologies, namely a mobile phone

30 See, for example, *Bladet Tromsø and Stensaas v Norway* [GC], no 21980/93, §§ 59 and 62, 9 July 1998.

31 To give a concrete recent example of this proviso in operation, the finding of no violation in the recent case of *Société éditirice Mediapart and Others v France* (nos 281/15 and 34445/15, 14 January 2021) was partly premised on a failure to observe journalistic duties and responsibilities. The applicant company complained that an injunction forcing it to remove from its website taped extracts of private conversations involving Liliane Bettencourt, heir to the L'Oreal fortune, in her own home, on subjects quite clearly of public interest, infringed the newspaper's Article 10 rights. In rejecting this complaint, the court emphasised not only the illicit nature of the recordings, the vulnerability of the applicant and the extent of the intrusion into her private life but also the need for those who benefit from public watchdog status, and therefore enhanced protection of their Article 10 rights, to fulfil their own clear duties and responsibilities. On the fact that the duties and responsibilities imposed may vary depending on the medium concerned, see *Jersild v Denmark*, no 36/1993/431/510, § 31, 22 August 1994; on the fact that the extent of those duties and responsibilities may vary in a given situation and the technical means used, see *Handyside v the United Kingdom*, no 5493/72, § 49, 7 December 1976.

application, in the context of a political campaign.[32] The case arose in the context of a referendum held in Hungary in 2016 in relation to the European Union's (EU) migration relocation plan, which was highly contested by the incumbent government. Just prior to the referendum a small opposition party (MKKP), which was against the referendum and whose platform encouraged the spoiling of ballots, had made available to voters an app allowing them to anonymously upload and share, in real time, photographs of their ballot papers, preferably spoiled.[33]

Following complaints by a private individual to the National Election Commission (NEC), the applicant party was fined for infringing the principles of fairness and secrecy of elections and that of the exercise of rights in accordance with their purpose provided by Hungarian law. Handing down its second of two rulings *after* the referendum had been held, the Kúria upheld the NEC's main finding regarding the infringement of the Hungarian principle of the exercise of rights in accordance with their purpose. However, it dismissed its conclusions regarding voting secrecy and the fairness of the referendum.

The Grand Chamber held, by 16 votes to one, that the relevant provisions of Hungarian law pursuant to which the injunction and a fine had been ordered, were neither sufficiently clear nor foreseeable. It is important to stress that the court took no position on whether ballot photographs could or should be legalised. That is not its role. Instead, the court enjoined Hungary, and indirectly other states, to provide for a clear regulatory framework in that regard; regardless of whether they had chosen a permissive or restrictive approach. The existing Hungarian legislation had allowed for the restriction of voting-related expressive conduct on a case-by-case basis, thus conferring a wide discretion on electoral bodies and domestic courts. However, the court noted that the NEC and the Kúria had disagreed as to the applicability of the basic principles of electoral procedure. In addition,

32 *Magyar Kétfarkú Kutya Párt v Hungary (MKKP)* [GC], no 201/17, 20 January 2020. It should of course be noted that Article 3 of Protocol no 1 does not as such apply to referenda (see, for example, *Moohan and Gillon v the United Kingdom (dec)*, nos 22962/15 and 23345/15, 13 June 2017, in relation to the Scottish independence referendum). However, in cases on referenda to date the court has indicated that 'Given that there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision …, the Court has not excluded the possibility that a democratic process described as a "referendum" by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1 … . However, in order to do so the process would need to take place 'at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".' (ibid § 42)

33 The app could be downloaded through Google Play and Apple Store free of charge and it was advertised on the political party's web and Facebook pages.

while the NEC had issued guidelines to the effect that the taking of ballot photographs was in breach of domestic law,[34] those guidelines were held not to be legally binding. As indicated previously, their relevance and legal effects were only clarified by the Kúria *after* the referendum had taken place.[35]

Context was central to the court's strict requirements regarding regulatory foreseeability:

> The electoral context takes on special significance in this regard, given the importance of the integrity of the voting process in preserving the confidence of the electorate in the democratic institutions. Accordingly, the Court has found wide and unpredictable interpretations of legal provisions governing elections to be either unforeseeable in their effects or indeed arbitrary and therefore incompatible with Article 3 of Protocol No. 1 ... .[36]

It is worth exploring whether future cases on freedom of expression and elections in a digital age may put some of the basic tenets of the established case law on Articles 10 and 3 of Protocol no 1 to the test.

1 Firstly, take the margin of appreciation which states enjoy. As I explained previously, it is narrow when the expression involved is in the context of a political debate; narrow when the work of a political party is at issue; wide when what is involved is the organisation and running of an electoral process,[37] but wide also when the issue at hand is not governed by a European consensus. This means that, where a complaint finds itself at the intersection between freedom of expression

34 Prior to the holding of the referendum, NEC guidelines had indicated, for over two years, that taking photographs of ballot papers in the polling station constituted an infringement of the principle of proper exercise of voting rights in accordance with their purpose. The same guidelines indicated that the use of ballot papers contrary to their purpose – namely to represent the choice of voters and establish the results of voting – could also infringe the principle of the secrecy of elections. Voters were under no obligation not to divulge how they had cast their ballot, but they were under an obligation to exercise their voting rights in accordance with their purpose. Voters, according to the NEC guidelines, 'cannot take the ballot paper out of the polling station and cannot take a photograph with either a telecommunication, digital or any other device with the purpose of showing it to another person'.

35 *MKKP* (n 32 above) §§ 113–114.

36 Ibid § 99. Compare with the very deferential approach in *Zhermal v Russia*, no 60983/00, 28 February 2008, where, despite imprecise electoral legislation, the court rejected an application under Article 3 of Protocol no 1 as manifestly ill-founded since the legislative imprecision of which the applicant voter complained had not, it held, dissuaded voters from exercising their right to vote in a manner which thwarted the free expression of the opinion of the people.

37 See *Bowman* (n 22 above); *Ždanoka v Latvia* [GC], no 58278/00, 16 March 2006; *Tv Vest AS* (n 27 above) and *Orlovskaya Iskra v Russia*, no 42911/08, 21 February 2017.

and the right to free elections, the court in Strasbourg may resort to a margin which expands and retracts – I've said on other occasions, a little bit like an accordion – depending on the circumstances of a given case. This flexibility in a Convention system which caters for 47 states is indispensable; but it should not become a source of jurisprudential inconsistency.

2 What constitutes a 'public watchdog' within the meaning of Article 10 has been changing as different and new forms of under or unregulated media emerge. The vital role of the print and broadcast media as 'public watchdogs' in a democratic society has been repeatedly recognised by the court.[38]

However, in recent case law on the right to receive information under Article 10, the court has highlighted the function of 'bloggers and popular users of the social media' who, it held, may also be assimilated to 'public watchdogs'.[39] There is something very 'democratic' in this approach, but it is potentially a major leap and one which could have important ramifications in electoral contexts. The individuals involved have not been subject to the same type or level of regulation as traditional media.[40]

It is important to remember that the heightened protection afforded freedom of expression until now has always been offset not only by the possibility of restrictions of that right, but also by the fact that Article 10 § 2 is the only Convention provision which explicitly refers to 'duties and responsibilities'. As the Council of Europe observed in a 2018 study, the factual basis of politics has until now been in part supported by a filter of journalism ethics and fact-checking. As a greater proportion of electoral information is now shown independently of such editorial gatekeeping,

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38 *Bladet Tromsø* (n 30 above) §§ 59 and 62, 20 May 1999.

39 *Magyar Helsinki Bizottság v Hungary* [GC], no 8030/11, § 168, 8 November 2016.

40 In *Delfi v Estonia* (GC), no 64569/09, 16 June 2015, the court held that an award of damages against an internet news portal for offensive comments posted on its site by anonymous third parties did not violate Article 10. Limiting the scope of the Grand Chamber judgment, it stated, §§ 115–116: 'The Court emphasises that the present case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them. ... the case does not concern other fora on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or blog as a hobby.'

this raises questions about the efficiency and adequacy of the type of self-regulatory filters on which reliance has been placed to date.[41]

Earlier this month the Committee of Ministers issued a series of recommendations to member states which respond to the fact that electoral communication is increasingly online and that online platforms are rapidly taking precedence over the traditional media as platforms for political advertising, while usually not being subject to a specific level of regulation and public oversight.[42] However useful these new recommendations, one still has a sense in 2022 that policymakers, lawmakers and courts are playing catch up.

3 The nature of the legal obligations which Article 3 of Protocol no 1 imposes on states is also worth highlighting. This article of the Convention does not lay down an obligation of non-interference, as with the majority of civil and political rights. It lays down an obligation of adoption by the state, as the ultimate guarantor of pluralism, of positive measures to 'hold' democratic elections to the legislature.[43]

The character of Article 3 Protocol no 1 obligations has ramifications when Article 10 comes into play in an electoral context. It seems likely that we will see more cases in which the court emphasises that states have a positive obligation under Article 10 to ensure that coverage is objective and compatible with the spirit of 'free elections', even in the absence of direct evidence of manipulation.[44] A positive obligations approach means that legislators need to strike the right balance

41 Council of Europe study (n 21 above) 19. See also the Council of Europe report, 'Information Disorder', DGI (2017) 09, according to which false or harmful information risked spreading among potential voters on an unprecedented scale and without oversight or rebuttal, and the Venice Commission, 'The Impact of Information Disorder (Disinformation) on Elections', 26 November 2018.

42 Recommendation CM/Rec (2022)12 of the Committee of Ministers to member states on electoral communication and media coverage of election campaigns, 6 April 2022.

43 See *Mathieu Mohin* (n 15 above)§ 50 and recently *Mugemangango* (n 17 above) § 68.

44 See *Communist Party of Russia and Others v Russia*, no 29400/05, 19 June 2012. The court found no violation of Article 10 in this regard, the respondent state had had legislation addressing neutrality and seeking to ensure a degree of pluralism and the parties had had access to airtime and the possibility of spreading their message on other media outside the state broadcasters.

between 'the two most important components of democracy'[45] and provide the necessary regulatory framework to allow both to thrive.[46]

The Hungarian case about the app which facilitated ballot sharing in real time suggests that regulatory gaps at domestic and European level in relation to freedom of expression and democratic processes may be a regular feature of cases in coming years.[47] The states' margin of appreciation to regulate electoral questions will necessarily remain wide in electoral cases. However, the question of the margin only arises once the judicial examination reaches the proportionality assessment. At a prior stage, in relation to the lawfulness of any interference, the Strasbourg court will assess the foreseeability and accessibility of the legal rules being challenged.[48] If legislators continue to play catch-up with information technologies, it is possible, if not likely, that problems will arise at that earlier lawfulness stage.

4 Another point which emerges from the Hungarian case is that the integrity of electoral systems may be undermined not just by the *content* of messages but also by the nature of the *medium* via which a message is conveyed. The established electoral rules in Hungary clearly prohibited campaigning in the vicinity of polling stations; yet the impugned mobile phone app, designed and made available as a campaign tool, could operate within the polling booths themselves. A form of digital political campaigning simply escaped the type of

45 See the judgment of Lady Hale in the House of Lords in *Animal Defenders* (n 25 above) at 49.

46 See further *Mugemangango* (n 17 above) § 109: 'Although Article 3 of Protocol No. 1 does not contain an express reference to the "lawfulness" of any measures taken by the State, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention … . This principle entails a duty on the part of the State to put in place a regulatory framework for securing its obligations under the Convention in general and Article 3 of Protocol No. 1 in particular …'; or *Animal Defenders* (n 25 above) § 101.

47 See also *OOO Informatsionnoye Agentsvo Tambov-Inform v Russia*, n 43351/12, 18 May 2021.

48 See also, for a violation of Article 3 of Protocol no 1 due to the lack of foreseeability of legislation regulating the finances of political parties, *Cumhuriyet Halk Partisi v Turkey*, no 19920/13, 26 July 2016. Given the risk that state scrutiny of party finances might be used as a 'political tool to exercise control over political parties', the court in that case required the impugned legal measures to demonstrate a high degree of foreseeability.

traditional or physical restrictions to which existing electoral rules had been geared.[49]

However much political parties are still prepared to pay for TV advertisements, it is difficult to conceive in 2021 of the European court or national courts for that matter reiterating the predominant place of television and radio broadcasting as the court did in 2013.[50]

In the nine years since *Animal Defenders*, the court has sought to grapple with the 'conflicting realities' (a term used in *Delfi v Estonia*) to which the internet and new technologies give rise. It has recognised, on the one hand, that user-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression. On the other hand, the internet can act as a forum for the speedy dissemination of unlawful forms of speech which may remain persistently online.[51]

A Russian case from 2020, *Engels*, concerned the removal by a website owner of information concerning filter bypassing tools to avoid his website being blocked by the Russian authorities. This case demonstrates how the 'conflicting realities' are playing out in the case law. The court found a violation of Article 10 in that case. The interference complained of was not prescribed by law as the Russian legal framework failed to establish safeguards capable of protecting individuals from the excessive and arbitrary effects of

49 Note that ballot selfies, a different expressive form which reveals the identity of the voter, have been the subject of differing rules and court judgments in the US. The leading US case seems to be *Rideout v Gardner* (838 F; 3d 65 (1st Cir 2016)) in which the First Circuit held that a New Hampshire law prohibiting voters from sharing ballot selfies was unconstitutional under the First Amendment. The New Hampshire Code, which since 1911 had forbidden voters to show others their marked ballots, had been amended to extend the prohibition to 'include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means'. The statute was considered overbroad as it restricted a form of speech regardless of where, when and how that imagery was publicised.

50 In *OOO Informatsionnoye* (n 47 above) § 88, the court observed, when assessing the quality of the Russian regulatory framework that 'online publications … tend to be accessible to a greater number of people and [are] viewed as a major source of information and ideas'.

51 See *Delfi* (n 40 above) § 110: 'The Court notes at the outset that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. … However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. These two conflicting realities lie at the heart of this case. … while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that the possibility of imposing liability for defamatory or other types of unlawful speech must, in principle, be retained, constituting an effective remedy for violations of personality rights.'

sweeping block measures. The breadth of the legal provision on which the interference was based was described as 'exceptional and unparalleled'. However, while a Chamber of the court recognised that 'any information technology can be subverted to carry out activities which are incompatible with the principles of a democratic society', it considered that:

> *all information technologies*, from the printing press to the internet, have been developed to store, retrieve and process information [and] ... *are content-neutral*. They are a means of storing and accessing content and cannot be equated with the content itself, whatever its legal status happens to be.[52]

It is worth pausing to reflect whether this assimilation of new information technologies with Gutenberg's fifteenth-century invention is really tenable. At the very least, there seems to be a tension between data protection cases under Article 8 – where it is the non-neutral impact of new technologies which is causing concern – and the presumption of content neutrality we find in this Article 10 case. As the world is fast but belatedly discovering, there appears to be nothing neutral about news curated and personalised by algorithms.

If one looks at one of the fault lines which divided the Strasbourg court 9:8 in the *Animal Defenders* case in 2013, we see the dissenters concentrating solely on the risk of political or electoral distortion coming from economic pressure being placed by wealthy individuals and groups directly on media organisations. However, would the focus nowadays not be also, if not more so, on the risk pinpointed by Lord Bingham in the House of Lords in that case. As always, he is worth citing at length:

> It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. ... [This] is [not] achieved if well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious. *The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them*. The rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising.[53]

52 *Engels v Russia*, no 619/16, 23 June 2020, §§ 39–40 (emphasis added).

53 Lord Bingham in *R (on the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* (2008) UKHL 15, 28 (emphasis added).

This sort of 'one-sided information overload' was treated with some scepticism by the Strasbourg dissenters in *Animal Defenders* in 2013.[54] It is something about which, in 2022, we need to think more seriously.

5 The court's case law has recognised that in the period preceding an election, opinions and information 'of all kinds' must be permitted to circulate freely. In *Salov v Ukraine*, for example, decided in 2005, the court held that: 'Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful.'[55]

Where does this inclusive, indeed permissive, approach in relation to political speech leave us in terms of disinformation and the speed with which the latter can spread in our digital world? The balance increasingly reflected in recent case law is between the interest of all participants in election campaigns in being able to use every means possible to influence voters and the right of candidates (and voters) to be protected from 'disinformation'.[56] The court has always emphasised that:

> ... all persons, including journalists, who exercise their freedom of expression undertake 'duties and responsibilities', the scope of which depends on their situation and the technical means they use ... .
>
> Hence, the safeguard afforded by Article 10 to journalists ... is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism ... .
>
> These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed.[57]

We are seeing more emphasis in recent cases on the duties and responsibilities expressly referred to in Article 10 § 2 and, particularly, on the duties of the press to report in a diligent manner and on the basis of facts.[58] In recent Polish cases the court has emphasised the

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54 See *Animal Defenders* (n 25 above) §§ 12 and 14 of the joint opinion of Judge Zeimele et al.

55 *Salov v Ukraine*, no 65518/01, judgment of 6 September 2005.

56 For definitions of 'disinformation' and what constitutes the now less accepted term 'fake news', see the preamble to the *EU Code of Practice on Disinformation*, 2018 and the report of the independent High Level Group on fake news and online disinformation commissioned by the EU Commission of the same year.

57 See *Stoll v Switzerland*, no 69698/01, 10 December 2007, §§ 102–106.

58 See, for example, *Staniszewski v Poland*, no 20422/15, judgment of 14 October 2021, § 52.

need to combat the dissemination of false information in relation to candidates in order to preserve the quality of public debate in the pre-electoral period. The factual basis for information should be precise and credible and journalists are required to act with due diligence.[59]

My colleague, Tim Eicke, the judge elected in respect of the UK, in a recent speech at Durham University, also pointed to another possibly relevant provision in the Strasbourg toolbox, namely Article 17.[60] That provision is aimed at ensuring that a person or a group of persons cannot attempt to rely on the rights enshrined in the Convention in relation to activities aimed at destroying those very rights'.[61] However, Article 17 is relied on only on an exceptional basis and in extreme cases. Judge Eicke points to cases like *Refah Partisi v Turkey*, where the court has recognised the very clear link between the Convention and democracy and stated that 'no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society'.[62] A role for Article 17 of the Convention, alone or in conjunction with Article 10 § 2 of the Convention, cannot be excluded in certain circumstances in future in electoral/democracy cases.

I return to the issue highlighted previously – the need for clear and accessible regulations which are suited to these 'conflicting realities' of our digital age. The challenge for lawmakers is not an easy one. Examining legislation from France and Italy which seeks to counteract disinformation campaigns, the United Nations (UN) Special Rapporteur has warned that:

> Vague prohibitions of disinformation [can] effectively empower government officials with the ability to determine the truthfulness or falsity of content in the public and political domain, in conflict with the requirements of necessity and proportionality … .[63]

Since the *Handyside* case in 1976, the court has defended one of the essential characteristics of free speech as being its ability to embrace 'not only … "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also … those that offend, shock or disturb the State or any sector of the population'.[64] The established case law thus poses limits on the range of options democratic states have available to them when dealing with expressions

59 See *Brzeziński v Poland*, no 47542/07, judgment of 25 July 2019, §§ 55–57.

60 T Eicke, 'Disinformation and democracy: the role of the ECHR' Irvine Lecture, Durham University Law School, 4 March 2022.

61 See *Perinçek v Switzerland* [GC], no 27510/ 08, § 113, 15 October 2015.

62 *Refah Partisi (The Welfare Party) and Others v Turkey*, no 41340/98, § 99, 13 February 2003.

63 UN Special Rapporteur (n 7 above) 9.

64 *Handyside* (n 31 above), Series A no 24.

which might be described as 'disinformation'.[65] One wonders whether the invasion of Ukraine and restrictive measures adopted at EU and national level might entail a leap in how we approach, on the one hand, the interrelated nature of democracy and expression and, on the other, what we may be willing to accept in terms of restrictions of certain forms of expression and content. On the first point, as the Strasbourg court retains residual jurisdiction in relation to Russia until September 2022 in relation to cases dealing with events which occurred before that date, I will not delve into the details of recently adopted Russian legislation criminalising what is treated as 'fake news' in relation to the invasion of Ukraine. However remarkable the new legislation may appear, those familiar with Strasbourg case law on Russian regulatory restrictions on speech and elections may not have been too surprised.[66]

On the second point, the terms of the EU regulation and decision from 1 March 2022 adopting restrictive measures in view of Russia's actions destabilising the situation in Ukraine are stark. The restrictive measures seek to counter hybrid threats, including disinformation. The Council does not mince its words:

> The Russian Federation has engaged in a systematic, international campaign of media manipulation and distortion of facts in order to enhance its strategy of destabilisation of its neighbouring countries of the Union and its Member States. In particular, propaganda has repeatedly and consistently targeted European political parties, especially during election periods ...[67]

The regulation and accompanying decision suspended the broadcasting activities of certain media outlets in the EU. In May 2022, the Strasbourg court found no violation of Article 10 following the revocation of a broadcasting licence in Moldova – the most serious form of interference – due to the media outlet's repeated refusal to abide by rules seeking to preserve political pluralism.[68] If nothing

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65 See also Eicke (n 60 above).

66 See, for example, *Teslenko and Others v Russia*, no 49588/12, judgment of 5 April 2022, where the court found a violation of Article 10 because, in the words of the concurring Judge Pavli: 'in the name of ensuring "the free expression of the opinion of the people in the choice of the legislature" or the head of State, the Russian Federation has effectively outlawed the public expression of electoral opinions and preferences by ordinary people in the crucial pre-election period'. One of the applicants had been prosecuted for unlawful pre-election campaigning in relation to a presidential election for placing the following statement in the rear window of his car: 'United Russia is a party of crooks and thieves.'

67 See Council Regulation (EU) 2022/350, of 1 March 2022, OJ L 65, 1, and previous discussion of restrictive measures against the head of the Russian Federal State news agency in *Kiselev v Council*, T-262/15, EU:T:2017:392.

68 *NIT srl and Others v Moldova* [GC], no 28470/12, judgment of 5 April 2022.

else, this recent judgment suggests that complete broadcasting bans will always be very difficult to defend but they cannot, in certain circumstances, be ruled out as indefensible. As the European political landscape changes, lawmakers and courts will be required to respond to those changes while safeguarding both electoral rights and rights of expression. The challenge will be to ensure that measures seeking to counter disinformation do not themselves have a prejudicial impact on human rights and democracy.

CONCLUSION

Given the events unfolding on our doorstep since the end of February, we are also reminded of Lord MacDermott's warning in 1972 to the effect that:

> The veneer of civilisation is thicker in some places than others but, by and large, it is still woefully thin.

Have we become complacent about democracy, about the value of our vote and the duties casting it entails, about the rule of law, about individual rights and the need in certain circumstances to sacrifice or curtail those rights in the general interest?

Democracy, as the Strasbourg Grand Chamber reiterated in July 2020:

> constitutes a fundamental element of the 'European public order'. The rights guaranteed under Article 3 of Protocol no. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law and are accordingly of prime importance in the Convention system.[69]

In addition, the court has repeatedly emphasised that 'one of the principal characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome';[70] a point better understood in this community than almost any other in Europe.

It is important in my conclusion to restate the fundamental principle which has run through Strasbourg case law on Article 10 for decades – freedom of political expression is a core value in any democratic state and any restrictions upon it need to be justified carefully and fully. None of the questions (or the alarm bells) I have raised this evening should be read as calling the importance of that principle into question.

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69 See *Mugemangango* (n 17 above) § 67. See also the Preamble to the Convention according to which fundamental human rights and freedoms are best maintained in an effective political democracy.

70 *United Communist Party of Turkey and Others v Turkey*, no 19392/92, 30 January 1998, § 44, Reports of Judgments and Decisions 1998 I.

Nevertheless, the digital world is changing the nature and economy of political campaigns, of politics and even of democracy as we know or knew it. If political democracy is the main virtue whose preservation has bestowed on freedom of expression its great value, it must surely follow that the preservation of democracy itself must be of equal, if not greater, importance than freedom of expression.[71] I put it to you that our legislation and our case law, whether national or European, still have to adapt further to accommodate the reality of twenty-first-century elections, new forms of expressive activity and the digital world. Those who believe in democracy and the rule of law – the subject of Lord MacDermott's speech 50 years ago – need to pay more heed to democratic institutions being weakened, to hard-won human rights being undermined and to international law being ignored.

As promised, I leave you on a personal note. Though now the judge elected in respect of Ireland I am, as a result of law, life and marriage, European to my very core. I am also the granddaughter of Antrim folk, headmaster and headmistress at Glenshesk school in the Glens of Antrim. As those roots are a source of considerable pride, I accepted your invitation with the greatest personal pleasure, conscious also of the honour bestowed.

71 See P Cumper, 'Balancing freedom of political expression against equality of political opportunity: the courts and the UK's broadcasting ban on political advertising' (2009) Public Law 89–111.