Chapter 10

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Equal time for Judas Iscariot? Broadcast treatment of political contests in the Republic of Ireland

Elections and referenda are hotly contested, and broadcasters sometimes find themselves accused of bias. The Oireachtas has passed laws that are intended to ensure that the radio and television coverage of campaigns is fair and balanced and is in accordance with constitutional rights. Those who feel aggrieved may complain in the first instance to the relevant broadcaster, and subsequently to the Broadcasting Authority of Ireland. The Oireachtas acts on the basis that broadcasting licences are granted by the state. No similar requirements apply to print or online media.

It has been customary for broadcasters to distribute airtime on any relevant programmes to political parties roughly in proportion to their performance at the preceding general election, in order to achieve fairness and balance without having to give every party the same amount of time on air. During elections it has also long been usual for some Irish broadcasters to devote airtime to short 'party political broadcasts'. These are not defined in law and their editorial content is controlled entirely by the party to which it is devoted.

During referenda campaigns, airtime may likewise be devoted to broadcasts controlled by contesting parties and other interest groups. Critics object that the legislative requirement for balance in broadcasting distorts the political landscape during some referenda campaigns if the great majority of elected representatives

support change but a small minority of public representatives and others receive a disproportionate amount of airtime to oppose it. When broadcasters themselves believe that a referendum proposal that is favoured by a large majority of politicians is eminently reasonable then they may resent facilitating contrary arguments, and some have been known to compare their dilemma mockingly to that of an editor who is forced to give equal airtime to comparing the respective merits of Jesus and Judas, the latter being the apostle who betrayed Jesus to the Romans for thirty pieces of silver. However, broadcasters are not in fact forced by law to give equal airtime to each side of the referendum argument provided that they can achieve fairness, objectivity and impartiality in some other way.

This chapter examines the statutory requirements for fairness, objectivity and impartiality in the broadcast treatment of political contests, including referenda, in the Republic of Ireland. It considers the ways in which legislative provisions have been interpreted by those whose duty it is to prepare related guidelines for broadcasters. It also considers the basis for a number of challenges to the legislation and to interpretations under it, and asks whether the law has an unreasonable impact on media coverage and political communication, not least by ensuring that ostensibly unrepresentative groups have access to the airwaves to an extent that some broadcasters might not otherwise permit.

Legal requirements

The most recent iteration of the relevant legislative requirements is found in the Broadcasting Act 2009. As these provisions are quite simple and so fundamental to a consideration of issues that have arisen, it is worth setting out the relevant subsections

before considering some of those issues. Section 39 (1) of the Act states that every broadcaster shall ensure that:

> (a) all news broadcast by the broadcaster is reported and presented in an objective and impartial manner and without any expression of the broadcaster's own views;
>
> (b) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views, except that should it prove impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other.

No broadcaster is obliged by law to transmit party political broadcasts. However, Section 39 (2) of the Act requires that a broadcaster does not, in the allocation of time for such broadcasts, give an unfair preference to any political party. Section 42 (1) of the Act requires that the Broadcasting Authority of Ireland, hereinafter BAI, devise and regularly update a code or codes governing standards and practice ('broadcasting code') to be observed by broadcasters. Similar codes were formerly prepared by the Independent Radio and Television Commission and the Broadcasting Commission of Ireland, which the BAI superseded, as well as by RTÉ.

The code

Immediately prior to the momentous general election of 2011 the BAI issued a document to provide guidance on the rules contained in its current Broadcasting Code on Election Coverage. It noted in its guidelines that:

> Broadcasters play an important role in the democratic process of elections and it is therefore appropriate that they have specific obligations in respect of the approach that they take to the coverage of an election. In this regard, broadcasters should make every effort to ensure fairness, objectivity and impartiality in the approach to coverage of an election, including the approach to the exposure given to candidates, electoral interests and political parties in the various elements of their programming. This includes participation by, and references to, candidates, electoral interests and political parties in all programmes.
>
> Broadcasters choosing to provide coverage of elections should develop mechanisms that are open, transparent and fair to all interested parties. These mechanisms should be considered and developed at an early stage and information on the approach being adopted should be available to all interested parties in advance.

The guidelines also noted that decisions in respect of editorial content rested with broadcasters; that it was individual broadcasters to decide the most effective way to reflect all the interests involved in an election (on a constituency, regional or national basis); and that ‘endorsements of candidates, electoral interests, political parties

and/or the policies of any of the aforementioned by broadcasters, including its presenters are not permitted.' It further required that senior staff with overall responsibility for election coverage should become fully familiar with the content of the code and noted that it is inappropriate for election candidates to present programmes during an election campaign. It also obliged senior staff with overall responsibility for election coverage to ensure that a range of views is adequately represented in the questions, comments and issues raised during programmes that include an element of audience participation. In relation to party political broadcasts the guidelines noted that while there is no obligation on broadcasters to transmit party political broadcasts, if broadcasters chose to do so, they have to do so free of charge (to ensure that the broadcast does not constitute a partisan political advertisement – such advertisements on radio and television being prohibited by Section 41(3) of the 2009 Act). It also stipulated that all such broadcasts should be transmitted at times that are aimed at achieving a similar audience for each of them and that such broadcasts be offered to registered political parties only.

Stop-watch

One way to achieve fairness during elections is by using a stop-watch to measure out airtime, both in respect of political party broadcasts and of news and programmes that deal with campaign issues. Then, should a party complain that it is not being treated fairly, the producer can point to a division of airtime that is proportionate to that party's most recent performance in a general election. While not always applied to the exact second or even minute, this kind of approach to achieving fairness has served both broadcasters and politicians well down the years and there have been few complaints relative to the volume of airtime devoted to politics.

One might have a philosophical discussion about the difference, if any, between the terms ‘fairness’ and ‘impartiality’ and ‘objectivity’ as these have been used but not precisely defined in broadcasting legislation or codes down the years. By now, in practice, the requirements tend to be taken to mean having at least one person represent each principal side of any argument being aired in the news or on current affairs programmes generally – while hearing from all parties in proportionate amounts (but not necessarily on the same programme) in respect of matters that are being contested during an election. The guidelines issued by the BAI specify no particular method of achieving fairness.

Referenda

The coverage of referenda campaigns presents broadcasters with a particular challenge. This is because the Constitution of Ireland can only be changed by a majority of voters in a referendum, regardless of how many political parties desire change. It is the case that only a majority of the Oireachtas may initiate a referendum on a particular proposal. However, a majority of the Oireachtas itself has no power to change the Constitution unless a majority of voters agree.

In this way the Constitution ‘belongs’ to the public in general and not to the political parties in the way that legislation does. It is possible, and indeed on the basis of precedents can be said to be the case, that the public may disagree with most of their elected politicians on the desirability of a proposed change to the Constitution. For this reason, simply dividing airtime proportionately between parties may distort the debate. Given that voters have at some point previously adopted any and every article in the Constitution that the Oireachtas subsequently proposes to amend or delete, it

may be considered fair that the arguments in favour of and against change are given equal time, regardless of how many or how few political parties support each side. Can citizens who have voted for politicians not be trusted to exercise equally good judgement when voting in any referendum? Some people believe that the opinions of the main political parties should be shown preference over all others.

Three key decisions of the Supreme Court have made it abundantly clear that the primacy of the people in respect of the Constitution has direct consequences for the manner in which public monies may be spent, directly or indirectly, in respect of a referendum campaign. The first, the McKenna case of 1995, was instigated by a member of the European Parliament and concerned direct government spending on publicity relating to a referendum question. Gallagher (1999, 82) has written that, '[b]efore 1995, the government of the day felt free to use public funds to promote its side of the case exclusively.' The second, the Coughlan case of 2000, was taken by a university lecturer and concerned the content of political party broadcasts in the light of both legislation requiring fairness and the use of public monies. The third case was that taken by McCrystal, in respect of the Children's Rights referendum in 2012. While these decisions are complex, and while it might have been better in terms of public understanding had only a single judgement been delivered in each case, each strongly reinforces the requirement for balance in broadcasting.

In McKenna v. An Taoiseach (1995), Patricia McKenna MEP initiated proceedings to stop the government spending public money on a campaign to persuade citizens to vote in a particular way in a referendum relating to Irish divorce laws. She successfully obtained a declaration that the government, in promoting a particular

outcome of the referendum, would be acting in breach of the Constitution. The government admitted that it had from time to time spent money from public funds on advertising and promoting a number of referenda campaigns, including some expenditure that was designed to persuade the electors to exercise their right in the manner put forward or suggested by the government. It denied that the government was constitutionally obliged to fund the promulgation of contrary opinions and / or information where groups wish to promulgate such information and or opinions. It maintained the right, 'in appropriate circumstances and where it seems fit to let its view be known, with the aid of public funds and if necessary in a trenchant and forthright manner.'

In his judgement in the Supreme Court, Chief Justice Liam Hamilton found that:

> The role of the People in amending the Constitution cannot be over-emphasised. It is solely their prerogative to amend any provision thereof by way of variation, addition or repeal or to refuse to amend. The decision is theirs and theirs alone. Having regard to the importance of the Constitution as the fundamental law of the State and the crucial role of the people in the adoption and enactment thereof, any amendment thereof must be in accordance with the constitutional process and no interference with that process can be permitted because as stated by Walsh J in Crotty's case, 'it is the people themselves who are the guardians of the Constitution' . . . The use by the Government of public funds to fund a campaign designed to influence the voters in favour of a 'Yes' vote is an interference with the democratic process and the constitutional process for the amendment of the Constitution

> and infringes the concept of equality which is fundamental to the democratic nature of the State.

Mrs Justice Susan Denham (who was later appointed chief justice) found that:

> The Constitution envisages a true democracy: the rule of the people. This case is about the constitutional relationship of the people to their government. The most fundamental method by which the people decide all questions of national policy according to the requirements of the common good is by way of referendum . . . The people alone amend the Constitution. In Byrne v Ireland, [1972] IR 242 the matter was encapsulated by Walsh J who stated at p 262: 'the State is the creation of the People and is to be governed in accordance with the provisions of the Constitution which was enacted by the People and which can be amended by the People only, and . . . the sovereign authority is the People.' In referenda the people vote on the proposed amendment. Such vote must be free. The issue is whether the government may spend public monies to promote a result in a referendum i.e. 'Vote Yes' . . . I am satisfied that the government are not entitled under the Constitution or law to spend public funds in this way. To so do would be to infringe upon at least three constitutional rights: (1) The right of equality; (2) The right to freedom of expression; and (3) The right to a democratic process in referenda.

Following the McKenna judgment, the Oireachtas passed the Referendum Act 1998. Under this legislation, the government appointed a Referendum Commission to supply the public fairly with information, including arguments from groups on

various sides of any referendum campaign. In 1999 Gallagher (82) believed the way in which the commission published 'a simplified version' of the arguments in two referenda that had been held during 1998 'was widely seen as unsatisfactory' and that in respect of the important referendum confirming the Good Friday Agreement on Northern Ireland the commission 'felt itself obliged to publicise some far-fetched claims simply because someone had made them.' However, few people think that their own claims are far-fetched or that the circulation of their own side's arguments is unsatisfactory.

The second important Supreme Court decision in the matter referred directly to RTÉ. This was Coughlan v. Broadcasting Complaints Commission (2000). This case involved a complaint about RTÉ's use of party political broadcasts during the divorce referendum of 1995. The complainant accepted that RTÉ was fair in its general coverage of the campaign in its news and current affairs programmes that 'represented 98% of the time expended by RTÉ on the coverage of the Referendum campaign.' In his judgement, Chief Justice Hamilton noted that:

> During the course of the campaign, however, RTÉ transmitted ten political party broadcasts aggregating 30 minutes which all favoured a 'yes' vote; two uncontested broadcasts from ad hoc campaign groups advocating a 'yes' vote aggregating 10 minutes and two uncontested broadcasts from ad hoc campaign groups advocating a 'no' vote aggregating 10 minutes ….

Mrs Justice Denham found that:

> Party political broadcasts must be analysed in accordance with the overall requirements of the Broadcasting Act . . . Thus, if the political parties take different stances on a referendum issue the broadcasting of party political broadcasts would present a divided view which would prima facie be fair even if not mathematically equal. Mathematical equality is not a requirement of constitutional fairness and equality. However, if all the parties are either in favour of or opposed to a referendum then party political broadcasts become prima facie, unfair and unequal and the issue must be approached from the standpoint of the overall obligations imposed by the legislation and the Constitution . . . It might be necessary to decide to hold no party political broadcasts in a referendum campaign.

Mr Justice Ronan Keane, the future chief justice, found that:

> It is enjoined by the terms of the statutes which created RTÉ to maintain objectivity and impartiality in all matters of public controversy. It would be remarkable if such a body differed from the Oireachtas and the government in enjoying a freedom to interfere with the result of a referendum by allowing political parties and other bodies which supported a particular outcome a considerable advantage in the broadcasting of partisan material over which they had unfettered control, subject only to any relevant laws such as that of defamation. I am satisfied that the High Court judge was correct in holding that the allocation of uncontested broadcasting time in the present case in those circumstances was legally impermissible. I do not overlook the difficulties created for RTÉ by this state of the law. As was emphasised on

> their behalf, they have no control over the editorial content of party political broadcasts . . . It may be that, having regard to those circumstances, the present state of the law leaves RTÉ in the position that they cannot safely transmit party political broadcasts during the course of referendum campaigns as distinct from other campaigns. Whether the difficulties confronting RTÉ in this area can or should be dealt with by legislation and, if so, how, are not matters for this court.

These are weighty and quite unambiguous judgements, notwithstanding the pragmatic qualification that '[m]athematical equality is not a requirement of constitutional fairness and equality.' The Coughlan judgement irked quite a few members of the political parties, not least because it was interpreted as 'requiring a rigidly equal allocation of campaign coverage by broadcasters between 'Yes' and 'No' viewpoints' (Carolan and O'Neill, 2010, 95). As subsequent RTÉ and BAI guidelines have indicated that may be an excessively restrictive interpretation. In 2004 Richard Sinnott (160–77) argued eloquently if not entirely persuasively that the courts might yet uphold a distinction between 'equal funding' and 'equitable funding', where the latter was distributed proportionately to the strength of opinion among elected representatives on a particular referendum question. However, squaring any mathematical inequality with the continuing requirement for fairness and balance remains a challenge for political scientists, politicians and broadcasters alike.

Under the Referendum Act 2001 the independent Referendum Commission lost the function of putting the arguments for and against any referendum proposal. This Act appeared to be a somewhat resentful response by political parties to the McKenna and

Coughlan judgements. From 2001 the Commission's role was confined to explaining the subject matter of referendum proposals, to promoting public awareness of the referendum and to encouraging the electorate to vote at the poll. Many politicians were again annoyed and embarrassed when, on 13 June 2008, the Irish people rejected the proposed amendment to the Irish Constitution that was required to permit ratification of the EU's Lisbon Treaty. Some believed that broadcasters had given undue attention to hitherto unrepresentative groups that opposed change, albeit in accordance with those broadcasters' statutory duties and the constitutional rights of citizens as upheld in the cases considered above.

Parliamentary report

When, in September 2008, the Joint Oireachtas Committee on the Constitution decided to undertake a review of the constitutional framework governing the referendum process, its members' first priority was an examination of the role of the media in the process. Its *Second Report: Articles 46 and 47, Amendment of the Constitution and the Referendum, first interim report* (2009) is both a perspective on the legal context and a record of the opinions of various interested parties. A substantial appendix to the report consists of a useful research paper looking, in particular, at the legal bases and the regulation of referenda campaigns in other EU member states and includes the matters of public funding and transparency of funding as well as the allocation of public and private broadcast air time. Deputies and senators concluded that there might be scope for new legislation to clarify or qualify the existing statutory requirements. They reported that (79):

> The practical effect of this decision [Coughlan] – or, perhaps, more accurately, the way that the decision has been applied in practice – is that broadcasters are required to provide an equal platform to the proponents of 'yes' and 'no' during the course of a referendum campaign. If one applies this principle to certain non-contentious referenda, it would mean that broadcasters would be obliged to apply the 'stopwatch' principle and facilitate ad-hoc opponents of the referendum by giving them exactly the same airtime as all the established political parties, even if the level of opposition to the proposal was tiny.

They cited as an example The Sixth Amendment of the Constitution Act 1979 (which dealt with the regularisation of adoption orders and in relation to which a referendum proposal was accepted by more than 98% of voters), and continued 'There seems to be a widespread sense that the allocation of broadcasting time in this fashion is wholly artificial and unreal.' They recalled that many broadcasters who gave evidence before the Committee testified to the existence of a problem:

> Thus, for example, as has been noted, the Independent Broadcasters of Ireland (IBI) commented that the perceived need for a 50/50 balance in referendum coverage meant that 'broadcasters were "strait jacketed" into dividing time equally in a manner that challenged their professional requirement to deliver balanced content. Real balance in terms of content may require that some groups and some claims require more scrutiny than others.'

The Oireachtas Committee members went on to note that the IBI had added that 'it cannot be in the public interest to give half the airtime automatically to one side in a

referendum simply because "they show up on the day", regardless of the merit of their argument, the motivation of their movement or the size of the democratic mandate: to do so amounts to the creation of a "crank's charter".' However, such observations by politicians and broadcasters appear to overlook the Supreme Court's acknowledgement that mathematical equality is not always necessary. The present author referred critically to the IBI contention when invited to give evidence to the committee, as it subsequently reported (59):

> Professor Kenny also commented on the suggestion that the current broadcasting regime was creating a 'crank's charter', by suggesting that if media organisations are free to exclude those they consider to be political cranks in respect of general political matters, then they could conceivably exclude even members of the Committee at some later stage. The abandonment of the 'fairness' doctrine in the United States in favour of commercial and ideological concerns, Professor Kenny opined, had led to the prevalence of radio 'shock-jocks' and the bias of channels such as Fox News.

In the end, the Oireachtas Committee recommended, among other things, that (80):

> Broadcasters would be entitled to have regard to a range of factors to inform their own judgment about what constitutes fairness of treatment, in the same way as they currently do with ordinary current affairs broadcasts. These factors could include considerations such as the relative strengths and standing of political parties; the standing and views of representatives from various interest groups and the views, expertise and reputation of individual

> contributors to a programme. The Committee considers that the fact that the referendum is supported or opposed by elected representatives is a relevant consideration in terms of the allocation of broadcasting time during the course of a referendum campaign.

Outside the Dáil, too, the IBI complained loudly about existing guidelines in respect of referenda coverage. Addressing an IBI conference on 3 March 2009, its chairman Willie O'Reilly (then chief executive of Today FM) said that the planned second Lisbon referendum brought the consequences of the Coughlan Judgement back into focus and would require broadcasters in Ireland to think carefully when it came to covering the ensuing debate:

> As an organisation we have already expressed our concerns about the Coughlan Judgement. While the guidelines of the Broadcasting Commission do not stipulate equal airtime, it does require 'equal treatment' and that both sides of the debate be represented in the same programme. There is a huge bias for contrarian opinion. It gives power without responsibility. For broadcasting to be balanced and for arguments to be probed, it is essential that the government and the Broadcasting Commission reflect on the effectiveness of the existing guidelines. It is essential that they do so urgently.

The guidelines that the BCI had issued in April 2008 in respect of coverage of the first Lisbon referendum were in fact adjusted by the BAI in advance of the second referendum that took place on 2 October 2009. Given that the law itself did not change, these adjustments were quite subtle and were a matter of emphasis rather than

substance. Although welcomed by the IBI, it is not entirely evident what significant practical difference, if any, the change in the guidelines has made. The guidelines certainly clarify the fact that the law has never required equal time on every occasion for all political or other parties in dispute. Yet, if broadcasters do not allocate approximately equal time for all political parties, or for the main sides of each argument in a referendum campaign, it is difficult to see how fairness, objectivity and impartiality can be achieved. The courts may take a dim view of any attempt on the part of broadcasters to interpret the changes as a nod and a wink to producers to stack their programmes in favour of what they consider to be the 'common sense' opinion or in favour of what broadcasting executives consider to be the dominant social and political point of view.

RTÉ guidelines

For its part, RTÉ issues internal guidelines prior to general elections and referenda and these guidelines reflect and elaborate guidance from the BAI. In a preliminary notice to staff prior to the 2011 general election, RTÉ's head of public affairs policy, Peter Feeney, addressed the difficult question of how one might measure balance:

> There is no mathematical formula which guarantees fairness. The achievement of balance and fairness cannot be reduced simply to a stopwatch exercise. The timing of exposure, the context of that exposure, the tone of the journalist, the subject matter and the choice of programme are all as relevant as the amount of time a candidate receives. RTÉ cannot commit to providing candidates with an exact amount of time on air. To do so would lead to non-journalistic decisions as to how much time to allocate and would unnecessarily

encumber producers and editors with unwieldy time requirements (RTÉ, 2011).

Having given this broad guidance, Feeney identified the criteria that programme-makers could use in deciding who to invite onto programmes and how much time to allocate to individual candidates:

Most people running for election are doing so as members of political parties. Therefore the first criterion and the most important is party membership. The allocation of time between and within parties is influenced by the following:

1. The percentage of first preference votes won nationally by the political parties in the last equivalent elections.
2. The number of candidates being put forward by the political parties.
3. Within parties recognition of candidates who are incumbents or who have previously held office.
4. Membership of Seanad Éireann or the European Parliament.
5. Within parties recognition of the fact that parties may be promoting particular candidates.
6. Alliances between parties, taking account of government and opposition, coalitions, common policy platforms, etc.
7. The results of by-elections, European and local elections since the last general election.

8. Opinion polling results over time showing current levels of support for parties.

9. Authoritative commentators' assessments of likely results both nationally and in individual constituencies.

10. Developments which take place during the course of the election campaign.

11. Newsworthiness at any particular time.

12. A minimum amount of attention which may be required to give to candidates from smaller parties to make their participation meaningful.

Feeney noted that candidates who ran as independents or who represented parties that did not have any elected representatives in Dáil Éireann were to be 'treated on a constituency basis rather than nationally.' Previous electoral performance (including local elections) was to be taken into account and Feeney also stressed the 'need to recognise that over 10% of the first preference vote goes to independents and 'smaller' parties.' As regards constituency profiles, if an individual constituency were to feature in a report or programme then all declared candidates had to be identified. To monitor the sensitive matter of balance, RTÉ sets up a special steering group during every election. Thus, in 2011 Feeney advised RTÉ staff that all programme-makers involved in any aspect of its election coverage were required to supply details of their coverage to the election monitor, and that all programmes were required to 'take extra care to ensure that we do not disadvantage any party or candidate in the important weeks leading up to polling day.' Feeney also advised that 'political scientists, commentators, etc who appear on programmes may need to have previous relationships to political parties made known to the audience' and that 'programme-

makers should ensure that commentators known to hold partisan views or are very critical of particular parties or politicians are not over-used and are balanced by other commentators who hold different views.'

The matter of balance took on a particularly difficult dimension in 2011 when it became evident that the parties that had formed a government following the previous election were about to be trounced in the general election that was called for 25 February. Even for someone as experienced as Peter Feeney, who had formerly worked as the station's head of current affairs, it was challenging to work out how to be fair when the balance of public opinion was so widely at variance with the relative balance of party representatives in the outgoing Dáil. For this reason, RTÉ brought in some academic expertise to advise it on how to proceed. It also retained the services of a responsible post-doctoral student to work to its manager of audience research on monitoring output. The station evolved a formula that had regard to the results of the previous general election, the percentage of seats held by parties at the dissolution of the Dáil, the percentage of candidates in each party and the current results of various opinion polls. RTÉ, which is publicly funded and the dominant source of news and current affairs, clearly went to elaborate lengths to ensure balance, yet its efforts might be undermined at a local level if local non-RTÉ stations to which so many tune, do not also make every reasonable effort to be fair. Given that people who are dissatisfied have an independent statutory mechanism for considering their complaints, there is little or no reason to believe that any significant number of people feel that Irish broadcasters are failing in their statutory duties when it comes to the coverage of elections and referenda.

Social media

In 2000, in the Coughlan case, Mrs Justice Denham stated that, 'The constitutional principles of equality and fairness applicable to broadcasting . . . will continue to be important as narrow casting is developed, as methods of communication which can be retrieved and viewed individually and repeatedly through electronic communication such as the Internet, is developed.' In 2003 McGonagle (409) observed that to continue divergent regulatory regimes in an environment of convergence 'seems impractical and undesirable, unless justified at the level of principle.' However, given that it is difficult for national regulators to regulate online content, it may be argued that it is desirable to regulate it indirectly insofar as broadcasters rely on online sources. Broadcasters do not work in a vacuum. The arrival of social media also has implications for the practices of broadcasters in that their employees' participation in discussions online or their publication of social media comments from members of the public may influence the audience's perception of the broadcaster itself. For this reason, prior to the general election of February 2011, RTÉ (2011) advised its staff that:

> An additional dimension to consider since the last general election is social media such as Twitter. Any person associated with RTÉ must consider that whatever they say on the likes of Twitter enters the public domain and has the potential to damage RTÉ's reputation for fairness and balance. Personal comments may be misinterpreted as 'an RTÉ view'. RTÉ employees should not discuss the election or issues that may become part of any election campaigns on social media. All other programme-makers should take extra care and precautions. This applies to both in-house and independent production companies. [RTÉ later added that] RTÉ staff with newsworthy

> contributions to make must operate on the basis that RTÉ's own social media sources should be facilitated ahead of any other sources.

It continued, under the heading 'RTÉ publishing social media comments from members of the public', and in words that anticipated the kind of error that was to be made by it during the presidential election later that same year:

> RTÉ radio and television programmes and rte.ie may include summaries of comments received from members of the public via social media. All such comments must be moderated in advance of publication to ensure that defamation is not an issue. Moderation will also ensure that offensive comments and language are excluded. Comments published should reflect accurately the comments received. In other words there is no requirement to be balanced between the political parties in the publication of comments. What is published should reflect the range of views received and should indicate the relative support for particular views. However as social media may be subject to campaigns trying to influence public opinion great care needs to be exercised to identify planned and organised use of social media. Where there is any suspicion that the opinions being received are being manipulated publication of such views should not take place.

Unfortunately for RTÉ, some of its personnel did not pay enough attention to this advice during the presidential election campaign in October 2011. In a debate between candidates on 'The Frontline' television programme on 25 October an allegation in a tweet from a Twitter account erroneously described by the respected

programme presenter as that of the official 'Martin McGuinness for President Campaign' was put by the presenter to a leading candidate, Seán Gallagher, in a way that discomforted him. The originator of the tweet appears to have deliberately set out to mislead its readers about its origin, and its content appears to have been at least partly inaccurate. Gallagher was not subsequently elected president, and the relevance of the tweet to this outcome remains a matter of strong opinion. The compliance committee of the Broadcasting Authority of Ireland subsequently found 'that the inclusion in a programme of this nature of what amounted to unverified information at the time of the broadcast, from a source that was wrongly accredited by the programme presenter' was unfair and required RTÉ, under Section 48 of the Broadcasting Act 2009, to transmit an apology (BAI, 2011). In covering this story, some journalists searched social media accounts maintained by members of the programme team, thus underlining also the wisdom of RTÉ's advice to its programme-makers about the potential problem of discussing in such fora any matters that may be deemed relevant to a political campaign. A review of the programme published in redacted form by RTÉ in December 2012 concluded that certain social media comments on Twitter by one of its assistant producers had been 'very unwise' (RTÉ, 2012, 21).

The debate continues

Nervousness about trusting people to make decisions about their own state's constitution when both advocates and opponents of proposals of change are given access to the airwaves in accordance with existing fairness legislation resurfaced in 2012 during the Fiscal Treaty referendum. This referendum, passed by 60.3% to 39.7%, required people to made a decision on complex matters relating to Ireland's

relationship with the European Union in the context of new structures to address the international economic crisis. The government was accused of trying to circumvent the law by running an information campaign that leading columnist Gene Kerrigan (2012) described as being 'self-evidently a YES campaign behind a threadbare disguise, using public funds to party advantage.' However, another leading columnist, who was formerly a candidate for Fianna Fáil, complained that, in referendum campaigns, '[t]he rules on media space mean independents and smaller parties get disproportionate attention' (Whelan, 2012).

Notwithstanding such criticism, the government proceeded to fund its own information campaign at the time of a referendum on the rights of children held on 10 November 2012. It was severely reprimanded by the Supreme Court for doing so, with the court finding that the government had 'acted wrongfully' in publishing an information booklet and website that were 'not fair, equal, impartial or neutral.' Chief Justice Susan Denham, who had been a judge of the courts that had decided both the McKenna and Coughlan cases, now referred to The European Commission for Democracy through Law, better known as 'the Venice Commission', which is the Council of Europe's advisory body on constitutional matters. She noted that the Commission's code of good practice on referenda includes a declaration that 'Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This entails a neutral attitude by administrative authorities, in particular with regard to: i. the referendum campaign; ii. coverage by the media, in particular by the publicly owned media; iii. public funding of campaign and its actors; iv. billposting and advertising; v. the right to demonstrate on public thoroughfares.' To some observers this ruling simply confirmed the unreasonableness of the fairness

requirement while to others it underlined the importance of fairness (O'Mahony, 2012; Kenny, 2012). What exactly constitutes fairness continues to be controversial but, in the opinion of this author, current legislation serves to protect the political process from abuse and citizens are well able to decide in the light of both sides of an argument how best to protect the Constitution for which they voted.

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