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Dr. Conor O'Mahony

University College Cork

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LEGAL REGULATION OF REFERENDUM CAMPAIGNS

Dr Conor O'Mahony, Senior Lecturer in Constitutional Law, University College Cork

1. USE OF PUBLIC FUNDS

While the text of the Constitution says very little about the conduct of referendum campaigns, the Courts have interpreted the Constitution as prohibiting the Government from using public funds to advocate for a Yes or No vote. This was established in the *McKenna* judgment, which related to the use of public funds to advocate for a Yes vote in the 1995 Divorce referendum. A sum of IR£500,000 was allocated for this purpose; no funding was allocated to advocating for a No vote, or indeed to any groups who were doing so. The Supreme Court ruled that this was unconstitutional as an interference with the referendum process that failed to treat both sides equally. The judgment does not precisely pin down the basis for this, but the following passage from O'Flaherty J captures its core principles:

> "…it is unrealistic to expect a Government to remain neutral on a topic which it has, through its initiative, brought to the People. However, the Government must stop short of spending public money in favour of one side which has the consequence of being to the detriment of those opposed to the constitutional amendment. To spend money in this way breaches the equality rights of the citizen enshrined in the Constitution as well as having the effect of putting the voting rights of one class of citizen (those in favour of the change) above those of another class of citizen (those against). The public purse must not be expended to espouse a point of view which may be anathema to certain citizens who, of necessity, have contributed to it."[1]

While the *McKenna* decision related to a campaign of intentional and overt advocacy, the same principle was later extended to the expenditure of public funds on campaign materials that are presented as neutral but may be subtly biased in favour of one side or the other. The *McCrystal* judgment related to the 2012 Children referendum, during which the Government expended €1.1 million on an information campaign that included a website, media advertising and a booklet that was sent to every household. While this campaign did not explicitly advocate for a Yes vote, and the Court was satisfied that it was not intended to do so, the Supreme Court nonetheless held that the cumulative effect of language and messaging used in the materials was biased in favour of a Yes vote and thus failed to adhere to the *McKenna* principles. Problems included the use of slogans such as "Protecting Children" and "Supporting Families" to describe the effect of the amendment, thus presenting it as inherently positive in nature; the rhetorical question, "Why do we need a referendum", which implied that the amendment was a necessity; positive imagery such as a smiley face in the letter O in the word "vote"; and the presence of a "like" button on social media links without any option for a "dislike" button.

In *McCrystal*, Denham CJ summarised the key principles deriving from these judgments as follows:

> "(i) The Government is entitled to campaign for a yes vote by any methods it chooses, other than by the expenditure of public funds. Such methods include writing, speaking, broadcasting, canvassing, leafleting and advertising. Some of these methods, such as writing, speaking, broadcasting on ordinarily scheduled current affairs programmes, and canvassing, are cost free. Others, such as the creation of a dedicated website, leafleting and advertising,

[1] *McKenna v An Taoiseach (No. 2)* [1995] 2 IR 10 at 43.

involve expenditure. Partisan advertising, that is advertising in one way or another urging a particular result, may be carried out by any person or by an organised group or political party, including parties composing the Government of the day, but it must be done at their own expense. Any 'information' disseminated by the Government at public expense must be equal, fair, impartial and neutral.

(ii) The Government is entitled to campaign for the change, and the members of the Government are entitled in their personal, party or Ministerial capacity to advocate the proposed change. Government Ministers may use their State transport in relation to the referendum and may avail of the radio, television and other media to put forward their point of view. However, the Government and its members must not spend public monies in favour of one side."[2]

Discussion points

The understanding and application of the *McKenna* and *McCrystal* judgments to date has been that they prohibit direct expenditure of public funds to favour one side of a referendum campaign during the formal campaign. This is relatively uncontroversial and has been recommended by the Council of Europe as necessary "in order to guarantee equality of opportunity and the freedom of voters to form an opinion".[3] The main points of discussion that arise from the judgments relate to whether the principles might currently, or should in the future, apply in other situations:

1. ***Direct versus indirect expenditure****:* While direct expenditure of campaigning is clearly impermissible, at least some indirect expenditure is permissible (with the use of State transport by Ministers on the campaign trail being singled out in both cases as acceptable). There are numerous other ways in which indirect expenditure might benefit one side of the campaign more than another. At one level, there is expenditure within the political establishment, such as general funding provided to political parties, and salaries and expenses of staff of Government departments, parliamentary assistants, special advisors and constituency office staff, all of whom may work on a referendum campaign in some shape or form. Closely related is the use of Oireachtas stationery or telephones for campaign-related work. At a further remove, there is the issue of public funds allocated to NGOs and civil society groups who may be actively advocating for a particular constitutional amendment. Clearly, it is not permissible to allocate funds to such organisations specifically for the task of referendum campaigning; but if funds are allocated to them for their general work, and referendum campaigning then becomes part of their work at a particular point in time, it is unclear whether this is captured by the *McKenna* and *McCrystal* judgments.
2. ***Application of principles outside of the formal campaign****:* The current understanding that the rules only apply once a referendum has been formally called, as up to that point, there is, strictly speaking, no referendum to speak of. However, this distinction might be rather artificial in the context of referendums which are the subject of prolonged public debate prior to the formal referendum campaign itself. Direct or indirect expenditure might be incurred in advance of the formal campaign that is directed to the same result as expenditure that is prohibited during the formal campaign, but the current state of the law allows for this to occur.

[2] *McCrystal v Minister for Children and Youth Affairs* [2012] 2 IR 726 at 753-754.
[3] European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice on Referendums* (Strasbourg: Council of Europe, 2007), p.19.

2. CAMPAIGN FINANCE

McKenna and *McCrystal* address the role of public funding in referendum campaigns, and their effect is to ensure that campaign funding comes solely from private sources. While private donations to referendum campaigns are permissible, there are extensive regulations governing them. The Electoral Act 1997, as amended, establishes the rules governing campaign finance, donations and disclosure requirements. These rules apply on a general level to political parties; but they also apply to other organisations such as NGOs or civil society groups who may take an active role in referendum campaigns. Any group which seeks to influence the outcome of a referendum and which accepts a donation exceeding the value of €100 in any calendar year falls within the definition of a "third party" working towards "political purposes", and is thus subject to the rules laid down in the Act.

Irish law places limits on campaign donations, but not on campaign spending. Thus, in theory, there is no limit to what a political party, an individual or another organisation might choose to spend on a referendum campaign. In practice, the donation limits on political parties and third parties are such that there is a natural limit to the funds they can raise and spend. However, there is nothing to stop an extremely wealthy individual from spending exorbitant sums of money in a private capacity advocating for a particular result.

Donation Limits

The limits on donations to political parties and third parties are as follows (all limits are stated to be "in any calendar year", which a referendum campaign will, in practice, always fall within):

- Anonymous donations: €100
- Individual donations: €200
- Corporate donations: €200 for unregistered donors; €2,500 for donors registered in the Register of Corporate Donors
- Foreign donations: prohibited, unless the donation is from an Irish citizen residing outside the island of Ireland (in which case the €200 limit for individual donations applies)

If donations are accepted which contravene any of the above regulations, the political party or third party is required to notify the Standards in Public Office Commission (SIPOC) within 14 days. The donation must be handed over to SIPOC.

Disclosure Requirements

Disclosure requirements for political parties and third parties kick in as soon as a donation exceeding €100 is received. At that point, and before incurring any expenses:

- Political parties and third parties must open a political donations account into which all donations are lodged. Annual statements from this account must be returned to SIPOC and the political party or third party must certify that all monetary donations received by the third party during the preceding year were lodged to the account and that all amounts debited from the account were used for political purposes.

- Political parties are required to establish accounting units to handle donations and return donation statements to SIPOC providing details of all donations exceeding €1,500, including the value of each individual donation and the name, description and postal address of the person by or on whose behalf the donation was made.
- Third parties need not disclose details of donations received, but must furnish to SIPOC:
    - the name and address of the third party and the name and address of the person responsible for its organisation, management or financial affairs;
    - a statement of the nature, purpose and estimated amount of donations to, and proposed expenses of, the third party during the year, and
    - an indication of any connection the third party may have with any political party or candidate at an election or referendum or otherwise.

Failure to adhere to the above regulations is a criminal offence, as is knowingly furnishing false or misleading information to SIPOC.

International Comparison

1. ***Donation and spending limits****:* by international standards, Ireland's campaign finance rules are relatively strict with respect to donations, by virtue of:
    - Relatively low limits placed on permissible donations
    - Onerous disclosure requirements
    - Regulations apply to both political parties and civil society groups

    In a study of 25 OECD countries, it was found that just 9 countries impose limits on referendum campaign contributions to political parties and just 7 impose limits on contributions to civil society groups.[4] On the other hand, there are no limits placed on campaign spending in Ireland; the same study found that campaign spending limits were more common than limits on donations, applying in half of the countries studied.[5]

    Across the EU, the limit on donations is generally higher than in Ireland, but is often combined with a ceiling on campaign expenditure.[6] For example, in the Scottish independence referendum, there was no limit imposed on the donations that could be accepted, but lead campaign groups had a spending limit of £1.5 million, while political parties and smaller groups had separate, lower limits. The absence of such a limit in Irish referendums is off-set at least in part by the strict limits on how much money can be raised in the first place; while Irish campaigners can spend as much as they can raise, they will not be able to raise very much, whereas in other countries, fundraising might be easier, but becomes pointless once it surpasses spending limits. But as noted above, the absence of spending limits in Ireland does leave wealthy individuals free to spend as much as they can afford on campaigning in a private capacity.

2. ***Public funding of campaign groups:*** Ireland does not have any system for providing direct public funding to advocacy groups on either side of the campaign (which, it should be noted, could be done in a manner that complied with the *McKenna* principles as long as equal funds

[4] Theresa Reidy and Jane Suiter, "Do rules matter? Categorizing the regulation of referendum campaigns" (2015) 38 *Electoral Studies* 159 at 166.
[5] Theresa Reidy and Jane Suiter, "Do rules matter? Categorizing the regulation of referendum campaigns" (2015) 38 *Electoral Studies* 159 at 168.
[6] *Party financing and referendum campaigns in EU member states* (Brussels: European Union, 2015), pp.51-59.

were provided to both sides). The provision of public funds to referendum campaign groups is relatively commonplace; countries where this approach is taken include Australia, the UK, Denmark, Italy and Sweden.[7] However, as noted in section 1 above, public funds are provided to both political parties and civil society groups for their general work, and when those parties or groups engage in referendum campaigning, this may amount to a form of indirect funding. As against this, there is no system in place for campaigners in Ireland to recoup campaign expenses, which differs from general elections, where candidates may be reimbursed expenses up to a maximum of €8,700 if they are elected or if they are not elected but receive a minimum number of votes.

3. BROADCAST COVERAGE

The rules governing broadcast coverage of a referendum campaign derive principally from statute rather than the constitution and apply at all times rather than just when a referendum has been called. However, they take on particular significance during a referendum campaign due to the *Coughlan* judgment, which again related to the 1995 Divorce referendum campaign.

The provision in question was section 18 of Broadcasting Act 1960, the key parts of which are effectively identical to the current provision (section 39 of the Broadcasting Act 2009). This provision requires that every broadcaster shall ensure that:

> "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".

The matter complained of in the *Coughlan* decision was the allocation of airtime for uncontested partisan broadcasts. Every major political party was given a slot, in addition to which the Yes and No campaigns were given 10 minutes each. However, since all political parties were advocating a Yes vote, the Yes side got 40 minutes of uncontested airtime, whereas the No campaign only got 10 minutes. In the Supreme Court, Keane J held that RTE:

> "… is precluded from forming any corporate view as to how the people should vote in a referendum. It is enjoined by the terms of the statutes which created RTE 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".[8]

[7] Theresa Reidy and Jane Suiter, "Do rules matter? Categorizing the regulation of referendum campaigns" (2015) 38 *Electoral Studies* 159 at 166.
[8] *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 at 57.

Discussion points

The main talking point about the *Coughlan* judgment relates to the manner in which it is to be implemented, and it might be questioned whether it has been misapplied by broadcasters in the years since.

1. ***Equal time**:* the underlying principle of the Broadcasting Act is that broadcasters must be "fair to all interests concerned". The particular form that the failure to do so took in the Divorce campaign was a significantly unequal allocation of uncontested broadcasting time. Much of the implementation of the judgment has focused on allocating equal time to advocates on either side rather than on the underlying principle of fairness. It would seem fairly obvious that allocating 40 minutes of uncontested broadcasts to one side and just 10 minutes to the other did not comply with the Act. However, this does not lead to the conclusion that precisely equal time must be afforded in every circumstance, including contested debates. It is questionable whether equal time allocation can be effectively achieved in the cut and thrust of a contested debate; nevertheless, stopwatches are routinely employed by broadcasters during debates. An excessive focus on equal time can be particularly artificial during campaigns where there is overwhelming support from the outset for one point of view, but broadcasters feel compelled to manufacture even-handed disagreement. This difficulty may lead to broadcaster choosing to avoid covering the referendum for fear of falling fall of *Coughlan*, which surely is not what the Supreme Court intended.
2. ***Unrelated programming**:* there have been examples where the *Coughlan* judgment has led to an extremely cautious approach being taken to programming which is not related to the referendum. Recent examples include where a Minister of State was asked to remove a pin from his lapel during an RTE interview that took place during a referendum campaign but did not discuss the referendum;[9] and reports of a Minister being disinvited from appearing on a cookery show that might be broadcast during a referendum campaign on which she has expressed strong views already.[10] Again, it is hard to see much of a relationship between these incidents and the conduct complained of in *Coughlan*.
3. ***Interrogation of arguments**:* a further issue relates to the extent to which broadcast journalists are willing to challenge campaigners during interviews or debates for fear that robust questioning might be seen as advocating on one side and fall foul of the law, and whether this can allow misinformation to be circulated freely through the broadcast media.
4. ***Other forms of media**:* it is notable that while the Broadcasting Act and the *Coughlan* judgment impose strict requirements on broadcast media, print media and digital media are wholly unregulated when it comes to referendum campaigns and may adopt entirely partisan positions.

[9] "Ireland's Equality Minister was asked by RTÉ to remove a Yes Equality pin", *TheJournal.ie*, May 10, 2015, http://www.thejournal.ie/aodhain-o-riordain-pingate-2094478-May2015/.

[10] Philip Ryan, "Minister axed from TV cooking show over referendum fears", *Sunday Independent*, December 17, 2017, https://amp.independent.ie/irish-news/politics/minister-axed-from-tv-cooking-show-over-referendum-fears-36414526.html.

4. REFERENDUM COMMISSION

Part of the response to the *McKenna* judgment was to establish the Referendum Commission, an independent statutory body whose function would be to raise public awareness of the fact that a referendum is taking place, encourage people to vote and provide them with information designed to assist them in making an informed decision. As a publicly funded body, the Commission is bound by the *McKenna* and *McCrystal* principles and thus restricted to providing impartial information. The Commission is an *ad hoc* body that is established afresh each time that a referendum is called and dissolved after the vote has been taken. It is ordinarily chaired by a sitting or retired High Court judge.

As originally established under the Referendum Act 1998, the Commission had the additional function of setting out the arguments for and against the proposal. However, the Referendum Act 2001 removed this particular function from the Commission, whose role is now restricted to the matters mentioned above.

Discussion points

1. ***Fact checking**:* one point of discussion that arises is whether the Commission has any formal role in "fact checking" the arguments of campaigners on either side. Misinformation is a common feature of referendum campaigns (not only in Ireland, it should be said), and as an independent body bound by law to be impartial, the Referendum Commission is, in theory, well placed to perform this role. Such a function is not explicitly written into the Referendum Act, but the legislation does allow the Commission to provide "any other information … that the Commission considers appropriate". Perhaps because the Commission is an *ad hoc* body that is established and dissolved for each referendum campaign with a different Chair each time, practice has varied over time.
   To give some recent examples: during the 2015 Marriage referendum, a central claim of the No campaign related to the effect of a Yes vote on the powers of the Oireachtas to legislate to regulate surrogacy and other forms of assisted human reproduction. On that occasion, the Commission Chair chose to address the claim quite directly in a number of broadcast interviews and to state that it was the Commission's view that there was no connection in law between the referendum and surrogacy.[11] By contrast, during the 2012 Children referendum and the 2013 Seanad referendum, the Commission Chairs avoided directly engaging with claims made by campaigners and restricted themselves to making factual statements. The difference of approach may also be partly attributable to the centrality to the campaign debates of claims about specific legal effects of the proposed amendment; when a particular claim features very prominently, it is more likely that broadcast journalists will put specific questions about those claims to the Commission Chair during television or radio interviews.
2. ***Permanent or* ad hoc *Commission***: a further point of discussion relating to the Referendum Commission is whether its *ad hoc* form is sufficient or whether it should be a permanent entity. On the one hand, it is conceivable that there could be a long gap between referendums, and it could be questioned whether there is a need to maintain and fund a permanent Commission during these periods. On the other hand, over the past twenty

[11] Ruadhán MacCormaic, "State may Still Favour Opposite-sex Parents if Vote Passes – Judge", *Irish Times*, May 15, 2015.

years, referendums have been held approximately once every two years. During that time, there has been extensive evidence of voter confusion on multiple proposals, and the current mechanism under which the Commission is not established until the referendum is formally called has often left it with just seven or eight weeks to start from scratch and complete its work. Multiple Commission reports have called for more time in this regard. A further suggestion is that the work of the Referendum Commission could be subsumed into a permanent Electoral Commission, whose remit would cover not just referendums but also elections, including general, local European and presidential elections.