

Paper of

Mark Brennock

Director of Public Affairs, Murray

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Referendum Campaign: Impact on the media of regulation

By Mark Brennock

Director of Public Affairs

Murray

Introduction

The reason the Assembly asked me to speak here alongside the other very distinguished speakers is, I think, that I have some experience of how regulation of the media affects how referendum campaigns are conducted and in particular how the media behaves during them.

I was a journalist for more than 20 years, spending most of that time working with the Irish Times, and having done a count last week I can see I was involved in covering 14 separate referendums. In 2006 I left journalism for the world of public relations and public affairs, and another count last week told me I have been the project manager of the public information campaign for seven Referendum Commission campaigns covering ten separate referendum proposals.

The questions I'd like to look at today are

1. The role of the media in communicating during a referendum campaign
2. The regulation of media and how it affects journalists and media during a referendum campaign: How the requirement for balance is interpreted by the media and how it should be interpreted
3. Does the Referendum Commission have a role in taking on claims made by one side or the other in a campaign if they are simply untrue?
4. Should regulation apply to other media, not just to broadcasters?

The role of the media in communicating during a referendum campaign

Referendum campaigns, like election campaigns, are fought very substantially through the media. Yes, people also get information on referendums directly. They meet canvassers, they receive leaflets in their letterboxes from the Yes and No campaigns and of course from the independent Referendum Commission.

But it is through the media that almost all information comes to them, and traditional media in particular remains hugely important in referendum campaigns. By traditional media I mean television, radio and print media. It is true that during the marriage referendum campaign there was a lot of comment on the much bigger than usual role of social media. There were statistics showing the huge reach of Facebook and Twitter posts. But reaching high numbers of people isn't the same as influencing them. There is a phenomenon acknowledged universally that on social media people tend to follow people whose views they agree with; they like posts they agree with. Social media is very lively during campaigns. But that, of itself, doesn't mean it is changing people's minds.

I'll come back later to a Reuters Institute report from just a few months ago which shows that in Ireland last year, two thirds of people still said they got news from television, 46% from radio and 40% from newspapers. Yes two thirds also got news online, but the most popular online sources were mainly the websites of traditional media – RTE, the Irish Independent and The Irish Times. The only major relative newcomer is thejournal.ie, a new online only news source which has had remarkable growth in influence.

But news and discussion debate on television and radio is not only a primary source of information from voters, it also sets the agenda for other media too. If the main broadcasters, particularly RTE, decide that a particular aspect of a story is the most relevant, this has huge influence on other media sources too.

So today I want to look at a few aspects of how the media is regulated, and how this regulation affects what journalists actually do during a referendum campaign.

Regulation of media and how it affects media and journalists during a campaign

When you hear people discussing the regulation of media during referendum campaigns or indeed election campaigns, they are almost always talking about the regulation of broadcast media only. Yes the print media is of course subject to regulation by law covering issues such as libel and defamation. People who feel they have been defamed can go to court to vindicate their good names. Online media including social media is subject to these laws too, but it has proven much harder to impose these laws on companies such as Facebook and Twitter who tend to say they are merely providers of the platforms on which these comments are made, and they are not responsible for the content.

But it is only broadcast media that faces the strict legal requirement to be balanced and fair. A newspaper can decide to campaign strongly on one side or another in a referendum. One newspaper could choose to publish a disproportionate amount of news coverage that highlights points being made by the Yes side. Another can publish lots of news information highlighting the points made by the No side. They can be as one-sided as they choose to be. Of course in every referendum campaign most newspapers publish material on both sides of the debate, but there is no doubt that it is often easy to detect the viewpoint or bias of a particular publication, and this is perfectly legal.

Later I'll talk a bit about the arguments over whether it is right, or not, that these requirements apply to broadcasters only. But first let's look at the current rules and regulation, and how they work.

The Broadcasting Acts require broadcasters, in their treatment of current affairs, to be objective, impartial and fair to all interests.

In the past broadcasters have tended to interpret this as meaning they must give exactly equal time to each side in a referendum debate. As Conor O'Mahony explained earlier, this may well be due to an over-interpretation of the Coughlan judgment... So even if there is a referendum proposal for which there is clearly overwhelming public support, broadcasters have felt obliged to seek out people who are against it in order to fulfil what some have seen as a 50/50 coverage requirement.

For example in 2013 there was a referendum held on whether or not to abolish the Senate, and there was a lively debate about this. However on the same day there was also a referendum on whether to establish a new Court of Appeal. There was no real campaign mounted to argue against this. However broadcasters felt they could not put many people on air arguing that this new court of appeal was a good idea, if there weren't voices from the other side saying it was a bad idea. And because there wasn't really another side, then there wasn't much discussion at all.

The same issue arose in relation to the referendum held in 2012 on children's rights. There seemed to be an overwhelming consensus in favour of this proposal among the main political parties and campaigning groups. This time there was a small number of opponents. These were very small groups but the 50/50 approach meant that although these were small groups with very limited support, they received very substantial airtime.

As Conor O'Mahony has outlined, the Coughlan decision seem to have been interpreted by broadcasters as being more restrictive than it actually is. It said that referendum broadcasts, which is time handed over to the Yes and No sides to make their case without interruption, must be allocated on a 50/50 basis. It did not, however, say that all coverage must be divided strictly in this way. Indeed the Broadcasting Authority of Ireland issued guidelines for coverage of the 2015 marriage referendum which made clear that there was room for flexibility on this. Perhaps the most significant thing they said was that there is no obligation to allocate an absolute equality of airtime to each side. They said that one can achieve fairness, objectivity and impartiality through the selection of contributors, the amount of airtime given to each side, the scope of the debate, the structure of the programme, the presenter's handling of the topic and so on.

They urged broadcasters to focus on the issue to be decided in any referendum, rather than just to measure the amount of coverage given to each side. In other words, the journalists should themselves do programmes and items on the factual situation rather than just allocate airtime to each side on a 50/50 basis.

As a former journalist I'd like to make a personal observation here. Journalists in general, and broadcast journalists in particular, come under huge pressure from all sides when they are covering contentious issues. They deal with accusations of bias all the time. In a referendum, as in an election campaign, they are under additional pressure in that any lack of fairness and balance is not just contrary to their own rules and codes of conduct, it is illegal. It takes a very brave journalist to do a programme on the subject matter of a referendum, using their own judgement as to what is fair and balanced. It is much easier simply to allocate half the time to one side, and half to the other, and just let them at it. It may not provide for great public education, but it does allow a journalist and his or her editor sleep more easily at night, free of the fear that one side or other might unsuccessfully claim you have been unfair or unbalanced. However let's be clear again: There is no legal requirement to divide broadcast time for referendum coverage on a strict 50/50 basis.

In practice, the Coughlan point is currently largely academic. In each referendum, all the uncontested broadcast time is given to the Referendum Commission to give a neutral explanation of the referendum proposal. There is no free airtime handed over to the Yes and No sides any more.

There is another aspect of the restriction on broadcasting that is the subject of comment and discussion. It is the very strict instruction to all radio and television presenters that they must appear neutral during a campaign. This is problematic when you consider the typical style of political interview we are used to hearing. The typical style of broadcast interview these days tends to be quite confrontational. The questions are less likely to sound like: "Good morning Minister, tell me about the plan you are announcing today?" Instead they have a tone of "Ah come off it Minister, what you're proposing clearly won't work." This confrontational style usually involves the interviewer putting the views of the politician's critics across in robust terms with a view no doubt to providing a lively discussion. However in circumstances where the interviewer is concerned about the need to seem neutral, then he or she is less likely to be confrontational. Critics say this means that advocates of the Yes and No side are given their allotted time to make their case, and that if they want to make outlandish claims then by and large they are allowed to do so.

Let's take a slightly silly example to highlight this point. In the normal course of events, someone who goes on air and declares that the world is round is typically allowed to say that without being challenged. However someone who comes on to argue that the earth is flat gets a more robust approach. They are asked to justify this view in the light of well established, known scientific evidence. They are shown photos of a round earth taken from outer space, as proof that the earth is round. They are asked how come, if the earth is flat, ships don't just disappear over the horizon all the time, and so on.

But if there were a referendum on the shape of the earth, broadcast interviewers might feel like holding back. So for example, when the campaigner who argues that the earth is flat makes his or her point, a normal response might be to say "oh for God's sake don't be ridiculous, sure look at the photo which shows it's round". But during a referendum campaign the interviewer might simply ask the speaker to explain what they mean and why they think it's flat, rather than challenge or question them robustly.

Journalists have a fear that if they robustly challenge one side or other, then they will be seen as behaving in an unfair and biased way.

Again, the 2015 guidelines from the Broadcasting Authority of Ireland have something to say on this, which suggests perhaps this requirement to seem neutral has been interpreted by journalists too strictly in the past.

They say: “the critical examination of the views of referenda interests campaigning for a particular outcome is not, in and of itself, evidence of a lack of fairness, objectivity and impartiality”. They say it is appropriate for journalists to examine and even robustly challenge statements made by various people during a campaign. So again, the impact of the requirement to be seen to be neutral may have led to a culture of caution which may not be justified.

However in the light of the regulations and requirements that are there, that caution is understandable.

Challenging untrue claims during a campaign. Has the Referendum Commission a role?

But in this regulated atmosphere, the question arises as to how any patently untrue claims can be challenged. To go back to the earlier example, when our imaginary flat earth campaign is out there making its case, who can stand up and point out that they are talking nonsense?

This brings me to the role of the Referendum Commission. I have managed the public information campaign of the Referendum Commission for each of the last seven campaigns covering ten different referendum proposals. On each occasion, media have contacted us during the campaign to ask would the Commission adjudicate on whether claims being made by one side or the other are factual or not. The Commission has from time to time clarified certain issues of controversy, but has always been reluctant to get involved in the daily cut and thrust of the campaign. The Commission is there to provide factual information and so they are slow to adjudicate on large numbers of assertions that properly belong in the realm of political and media discussion.

First, as discussed earlier, the role of the Commission is laid out quite clearly in the Referendum Act. It is

- *to prepare one or more statements containing a general explanation of the subject matter of the referendum proposal;*
- *to publish and distribute these statements in a way that ensures that the electorate becomes aware of them;*
- *and to promote public awareness of the referendum and encourage people to vote.*

So it is not set up as some sort of highly activist referee, jumping into the debate, exploding myths, and brandishing yellow and red cards at campaigners who say things that are not

quite true. Its job, set out in law, is to prepare statements giving a general explanation of the proposal, not to instigate high profile public disagreements with various campaigns.

Nevertheless, over the past ten years the Commission has steadily grown in its interaction with the media. Each Commission has a chairperson appointed, and that person is either a sitting judge of the High Court, or a retired judge of the High Court of Supreme Court. In recent years, the chairperson has done a number of media interviews, with that number growing steadily.

The interviews allow the Commission both to explain the referendum proposal in general, and also to answer questions about claims that have been put forward during the campaign by different sides of the debate. The broadcasters generally accept that the Commission Chair's role is to explain the proposal, and not to argue directly with campaigners on one side or another.

The Commission does not answer questions on a particular issue without thought. Each issue of significance is considered by the full Commission with the assistance of legal advice, and an answer is then prepared. In other words the Commission considers its answers very carefully – its members do not see their role as being to appear all over the media answering questions off the top of their heads. As mentioned earlier the Commission also uses a substantial amount of airtime on all national and local television and radio stations to broadcast brief explanations of the referendum proposals, and to encourage people to vote.

The Commission has grown steadily into being a very valuable source of public guidance during any campaign. My own experience is that people believe it – a rare achievement for any public body in these days of growing scepticism about all official sources of information. During and after a number of recent campaigns, the Commission has been subject to judicial review proceedings by individuals unhappy with things the Commission has said or done during the campaign. None of these proceedings has ever succeeded. There are those who demand that the Commission become even more interventionist in the referendum debate. However in my view, the fact that it does not enter the debate at the drop of a hat means that when it does say something during a campaign, it carries a lot of weight.

Importantly, my experience is that the media rely more and more on the Commission to help them to explain referendum proposals. So when confronted with campaigners making claims as to what some aspect of a particular referendum proposal will mean, the Commission's explanation on that particular aspect will very often be given prominence as being the most credible view.

Should regulation apply to other media, not just to broadcasters?

A final point I'd like to look at is whether regulation of media coverage should apply to broadcasters only. As a former newspaper journalist I know very well how the influence of newspapers and indeed of all traditional media is declining as more and more people access information and opinion online. But newspapers remain influential. Should they not have a legal obligation to be fair and balanced?

One side of this argument asks is it right that the owners of media can potentially have huge influence on voters' decisions simply because they own the press. We hear an argument in many countries that well-off media owners can influence election outcomes and therefore they have disproportionate political influence. If this is so, then they also have huge power to influence referendum outcomes.

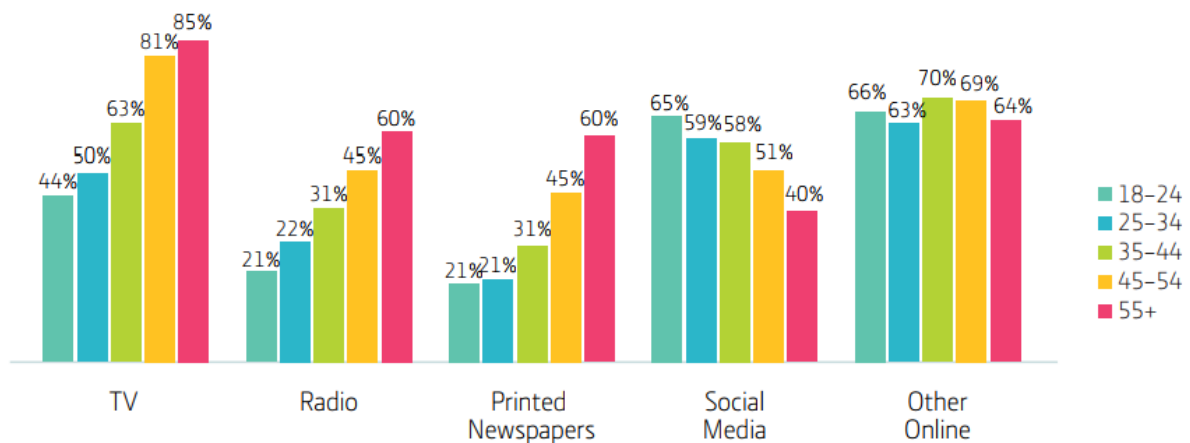
But the other side is that it is dangerous to have the State, and perhaps the Government of the day, regulating media output. The typical argument for freedom of the press states that a newspaper should have the right to argue for whichever side it chooses. It is also easy to see that in the case of broadcasters that receive substantial state funding such as RTE, they should be neutral and be seen to be neutral.

But what about privately owned broadcasters? Should they be regulated? To give one example, in the United States Fox news is often accused of bias towards the views of the political right. We might not like this, but should there actually be laws preventing this?

You'll notice that I'm taking the position of an impartial journalist here: asking questions, not giving the answers. But ultimately these are issues for you to consider. Finally, when looking at the regulation of media during referendum campaigns, it is worth reminding ourselves just how much the media landscape is changing, and how journalism is changing with it. The Reuters Institute produces an annual digital news report and last year's shows that while television and radio are still very powerful sources of news for Irish people, they have strong competition.

When people were asked which sources they used for news in the last week, 68% said they got it from television and 46% from radio. However 66% also got news online, and that's not including those who got it from social media and blogs. A further 52% got their news from social media, and in bad news for fans of newspapers, just 40% got it from printed newspapers.

The trend is obvious when you look at how news is sourced by different age groups. The graph below shows how younger age groups are moving away from traditional media such as television, radio and newspapers. As time passes these will certainly have less influence, though they remain powerful in terms of their ability to set the agenda for others.



Which, if any, platforms have you used in the last week as a source of news?

Because when you look more closely you can see that the traditional established media retains strong influence among the online news consumers too. The top digital sources of news, TheJournal.ie, Irish Independent Online and RTÉ News Online, all showed growth during the period covered by the report. When the public was asked which news sources they trusted most, the online offerings of legacy newspaper brands scored best for accurate news, as aids to understand complex issues and for providing strong viewpoints and opinions.

And despite the growth in the use of social media for news, the report shows people trust social media a lot less than traditional media. They understand that online there are many sources of what today we call fake news. So the fact that regulation does not apply to social media and many online sources matters less than it seems: It applies to the media that matters most.

So some conclusions

- The requirement for balance applies to broadcasters only. There is no doubt that other media, such as newspapers, online sources and social media have a major influence during referendum campaigns, and these do not face the same legal restrictions.
- However there is an argument that broadcasting is a special case and deserves special regulation. Despite the rise of online and social media sources, radio and television remains hugely influential in setting the agenda for a referendum campaign.

- There is a requirement on broadcast media to be balanced, but the Broadcasting Authority of Ireland made clear in its guidelines for the most recent referendum that this did not mean that coverage should be split precisely 50/50 between the yes and no sides.
- Broadcast media are also allowed to do their own programmes on the subject matter of referendums, so long as they are balanced. However there is a very understandable culture of caution among journalists about doing this. Campaigners on each side of a divisive referendum campaign will complain about perceived bias very easily, and broadcasters will need to be courageous and confident in their own abilities to make programmes that would stand up to criticism and dissection, possibly in a court of law.
- The Referendum Commission itself has become a very strong and well-regarded voice in the course of referendum campaigns and is seen as providing a detached and unbiased explanation of referendum proposals. It does not, however, intervene in the campaign date on a very regular basis and in my view this is the correct approach.

Ends.