

The electoral commission, disinformation and freedom of expression

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Abstract

This commentary examines how the prospective electoral commission could play a role in combatting disinformation in the run-up to Irish elections. While legislative debates have pointed to the potential role of the commission in protecting elections from anti-democratic actors who disseminate false electoral claims, no clear mandate has detailed how this could manifest. This ambiguity is exacerbated by Ireland's electoral statutory framework, which has struggled to adapt to the challenging digital realities of contemporary electoral engagement. While the emergence of disinformation and related digital exigencies represents a potential for regulatory scrutiny, this must be considered alongside Article 10 of the European Convention on Human Rights (ECHR) and Article 40.6.1 of the Irish Constitution, both of which protect the right to freedom of expression. In positing how the new commission could counter electoral disinformation, a natural starting point is to probe how such functions are shaped and limited by this fundamental right. Moreover, the reluctance of the Irish judiciary and the European Court of Human Rights (ECtHR) to accept regulatory interference with political expression means that restrictions on the dissemination of information in the run-up to elections must be treated with delicacy when shaping the commission's potential functions in this critical area.

Keywords: electoral commission; disinformation; human rights; freedom of expression.

Introduction

In the Programme for Government (PfG) published in June 2020, the newly formed Irish government signed off on a commitment to finally establish a permanent electoral commission. This comes over a decade since a report by the Geary Institute from University College Dublin (UCD) recommended its establishment as a statutory body.¹ As of now, the mandate of the new commission is to 'provide independent oversight of elections and referendums, to inform the public about elections and referendums, to update and maintain the electoral register and to conduct elections'.² Broadly speaking, this consolidation of electoral oversight is long overdue and is a potential gateway to necessary electoral reform in Ireland. Specific areas of accountability in existing bodies are increasingly fractured. For example, the Referendum Commission's role is limited to

1 Richard Sinnott et al, *Preliminary Study on the Establishment of an Electoral Commission in Ireland* (UCD Geary Institute 2008).

2 Programme for Government – Our Shared Future
<<https://static.rasset.ie/documents/news/2020/06/draft-programme-for-govt.pdf>>.

oversight of referendums, while the Standards in Public Office Commission is not accountable for local elections. Accordingly, 'there is no one actor responsible for devising and pioneering a reform agenda in the sensitive area of electoral policy,' leading to a 'piecemeal approach' that has hampered substantive reform.³ This fragmentation of accountability has contributed what Reidy condemns as a 'moribund' system that has failed to progress 'into the 21st century', and one that requires consolidation through a new statutory body. As Kavanagh notes, attempts to 'modernise' the Irish electoral legislative framework have proven extremely difficult, in particular, in light of the 'costly failure' of attempts to introduce electronic voting in Ireland.⁴ In view of electoral dangers associated with the rise of technology in Irish democracy, new legal, constitutional and technical challenges have emerged, which call into question the functional scope of the long-proposed commission in protecting the right to vote under Article 16(1)(2) of Bunreacht na hÉireann and Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR) from emergent threats in an increasingly digital electoral environment.

1 Technology, veracity, and electoral uncertainty

A critical aspect of the commission's function remains unclear and in desperate need of clarification. That is, what role will the commission play in meeting the contemporary challenge of electoral disinformation online? This unanswered question is highly prescient, in particular light of the potential scope for the commission to 'regulate online political advertising in the public interest' and harmonise a new legislative regime for 'political advertising across all media'.⁵ This would represent a long overdue designated regulatory framework for political advertising online, the absence of which is currently recognised as a 'lacuna' that exacerbates the harms of digitally spawned false and misleading information in the run-up to elections.⁶ Existing instruments, such as the Electoral Act 1997, restrict anonymous and excessive donations.⁷ However, these legislative provisions fail to address digital political adverts and electoral campaigning, nor do they scrutinise the veracity and accuracy of claims that surface in the course of electoral advertising online. This presents legal loopholes within 'electoral laws' and 'electoral procedures' that Kavanagh highlights as the core of 'electoral integrity'.⁸ While COVID-19 has justifiably amplified concerns surrounding the public harms of false and misleading claims online,⁹ disinformation had been recognised as an electoral threat long before the pandemic. In 2018, the Irish government produced the *First Report of the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation*. While the report found a generally high level of public trust and technical security in the electoral

3 Report of the Joint Committee on the Consultation on the Proposed Electoral Commission (Houses of the Oireachtas 2016) 7

<<https://webarchive.oireachtas.ie/parliament/media/committees/archivedcommittees/environmentcultureandthegaeltacht/report-on-electoral-commission-final-20160113.pdf>>.

4 Jennifer Kavanagh, 'Electoral law in Ireland: sustaining electoral integrity from process, procedures, and precedent?' (2015) 30(4) Irish Political Studies 510–530.

5 Ibid.

6 'Proposal to Regulate Transparency of Online Political Advertising' (*Merrion Street*, 5 November 2019) <https://merrionstreet.ie/en/News-Room/News/Proposal_to_Regulate_Transparency_of_Online_Political_Advertising.html>.

7 Electoral Act 1997, section 23.

8 Kavanagh (n 4).

9 Jack Horgan Jones, 'No plans to combat sharing of coronavirus misinformation on WhatsApp' *Irish Times* (Dublin, 16 March 2020).

process, online threats were identified as unique sources¹⁰ of electoral dangers.¹¹ Specifically, ‘cyber attacks’ and ‘the spread of disinformation online’ were identified as ‘substantial risks’ to Ireland’s electoral process.¹² These concerns prompted recommendations for the legislature to ‘expedite the establishment’ of a permanent commission. Disinformation has already had damaging effects on the Irish electorate, whose democratic engagement is increasingly characterised by the use of digital platforms and consternation surrounding the authenticity of information online.¹³ In the aftermath of the abortion referendum in 2018, Murphy et al exposed 3140 participants to six news stories (two false and four verified). Almost half of respondents reported a memory for at least one of the false stories. Those who reported memories about false stories were ‘more likely to remember falsehoods about the opposing side’ of the abortion referendum and many did not revise their memory after being exposed to its falsity.¹⁴ These developments leave the contemporary Irish legal framework in a precarious situation with regard to how maladaptive legislation has struggled to respond to these threats and the inability of voters to tell fact from fiction in the increasingly digitised electoral environment. Codes from the Advertising Standards Authority of Ireland (ASAI) do address *online* advertising¹⁵ and stipulate that advertisements must be ‘honest and truthful’.¹⁶ However, such codes are non-binding and are chiefly directed at commercial marketing communications, not political content. These exist within broader soft law attempts to control digital disinformation, such as the European Commission’s Codes of Practice, non-binding guidelines aimed at curbing disinformation through voluntary compliance by technological signatories. Recent attempts have been made to modernise Ireland’s electoral regulatory framework, but have not yet come to fruition. The Social Media Online Advertising Transparency Bill 2017, proposed by Deputy James Lawless TD, was one such attempt.¹⁷ This Bill proposed statutory requirements for online political advertisements to include ‘transparency notices’, which are required to ‘display in a clear and conspicuous manner’ funding details and target audiences.¹⁸ The proposed legislation also attempted to introduce an imposition of statutory fines for failure to display transparency notices¹⁹ and the use of automated, or ‘bot’, accounts ‘to cause multiple online presences directed towards a political end to present as an individual account or profile on an online platform’.²⁰ While the 2017 Bill entailed encouraging

10 Department of An Taoiseach, *First Report of The Interdepartmental Group on Security of Ireland’s Electoral Process and Disinformation* (Government of Ireland 2018).

11 Niamh Kirk et al, *Digital News Report Ireland* (Reuters 2019) <<https://www.bai.ie/en/increase-in-number-of-irish-media-consumers-concerned-about-fake-news-on-the-internet-reuters-digital-news-report-2019-ireland/>> Last accessed 7 August 2020.

12 Department of An Taoiseach, *Overview: Regulation of Transparency of Online Political Advertising in Ireland* (BAI, 14 February 2019) <<https://www.gov.ie/en/policy-information/7a3a7b-overview-regulation-of-transparency-of-online-political-advertising-/>>.

13 Broadcasting Authority of Ireland, ‘Over half of Irish consumers (52%) now get their news via social media sites’ (15 June 2016) <<https://www.bai.ie/en/over-half-of-irish-consumers-52-now-get-their-news-via-social-media-sites/>>; Charlie Taylor, ‘Some 90% of Irish people aged between 19 and 24 use social networks’, *Irish Times* (Dublin, 4 July 2019) <<https://www.irishtimes.com/business/technology/some-90-of-irish-people-aged-between-19-and-24-use-social-networks-1.3944424>>.

14 Gillian Murphy et al, ‘Fake news can lead to false memories’ (2019) *Science Daily* <<https://www.sciencedaily.com/releases/2019/08/190821082228.htm>>.

15 ASAI Codes <<https://www.asai.ie/code/>>.

16 Ibid.

17 Online Advertising and Social Media (Transparency) Bill 2017 Part 1, 2.

18 Ibid.

19 Ibid.

20 Ibid.

attempts to enshrine transparency into political advertising, it was defeated before the committee stage in the Dáil. In addition, the Bill entailed problematic aspects, including the imposition of criminal penalties for offences. One legislator, Ruth Coppinger TD, contested the Bill on the basis that it underestimated social media's empowering role in galvanising anti-water charge protests in Ireland.²¹

2 Constitutional and fundamental rights concerns

This objection to the 2017 Bill is inextricably linked to a necessary question that must be scrutinised when addressing the scope of the new electoral commission in its ability to combat the democratic harms associated with electoral disinformation online. That is, how can the problem be curbed while simultaneously preserving fundamental rights to freedom of expression? Under Article 40(6)(1) of the Constitution, and Article 10 of the ECHR, freedom of expression is protected. In other common law jurisdiction such as the United States, the freedom of speech clause of the first amendment has been used by the judiciary to strike down provisions of federal electoral legislation in the 2002 Bipartisan Campaign Reform Act which imposed restrictions on independent corporate expenditures from corporations, as demonstrated in *Citizens United v Federal Election Commission*.²² However, neither the Irish Constitution nor the ECHR are absolute in protecting expression. Interferences are subject to limitations and must be proportionate. Like the ECHR, the Irish Constitution 'has developed organically to reflect and accommodate a changing society since 1937' to allow for 'contemporary conceptions of human rights'.²³ Increasingly, tension arises between traditional concepts of freedom of expression and modern forms of electoral interference that yield unprecedented challenges, thereby threatening historically rigid paradigms. Barendt argues that, under one of four theoretical arguments for 'freedom of speech', public opinion can only be meaningfully achieved through 'sustaining individual access to uninhibited public debate on political issues'.²⁴ Habermas posits the formation of 'public opinion' as a core function of the 'public sphere' in democracy.²⁵ However, these concepts are challenged in an era where public opinion itself is the target of sophisticated and technologically driven anti-democratic actors. As John contends, this has led to a revisiting of 'traditional conceptions of freedom of expression' in light of the 'global character of Internet speech'²⁶ and social media's growing mantle in democracy.²⁷ Not all forms of disinformation are equal, and this is highly prescient from the perspective of freedom of expression. Various types of disinformation, depending on the level of foreseeable harm and abusive content, are subject to different legal scrutiny. Satire and parody, for example, often described as forms of 'fake news',²⁸ are robustly protected under Article 10.²⁹

21 Marie O'Halloran, 'Government defeated on Online Advertising and Social Media Bill', *Irish Times* (Dublin, 14 December 2017).

22 *Citizens United v Federal Election Commission* [2010] 558 US 3.

23 Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (3rd edn, Butterworths 1994).

24 Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005).

25 Jürgen Habermas et al, 'The public sphere: an encyclopedia article' (1974) 3 *New German Critique* 49–55.

26 Richard R John, 'Freedom of expression in the digital age: a historian's perspective' (2019) 4(1) *Church, Communication and Culture* 25–38.

27 *Ibid.*

28 Edson C Tandoc Jr, Zheng Wei Lim and Richard Ling, 'Defining fake news' (2018) 6(2) *Digital Journalism* 137–153.

29 *Ziembinsky v Poland* (No 2), App no 1799/07 (ECHR 5 July 2016).

3 The precarious case of political expression

One legal principle congruent with both traditional views on freedom of expression and the contemporary information age is, as Barendt highlights, the reluctance of the judiciary 'to countenance abridgements of political and social discussion'. This is highly germane when addressing how the incoming electoral commission must delicately mediate its necessary role in combatting disinformation while maintaining consistency with protections to freedom of expression under Article 40 of the Irish constitution and under Article 10 of the ECHR. As demonstrated by relevant jurisprudence from both the Irish judiciary and the European Court of Human Rights (ECtHR), a key challenge that emerges for the new commission is that extreme caution must be exercised in potential incursions on political forms of expression, and care must be exercised in maintaining impartiality when imparting information to the Irish electorate. Under Article 40(6)(1) of *Bunreacht na hÉireann*, the right of citizens to 'express freely their convictions and opinions' is protected. This includes 'criticism of Government policy' but excludes 'the publication or utterance of seditious or indecent matter'.³⁰ Furthermore, this right is subject to conditions that secure public order and morality. When considering the scope for the electoral commission in tackling electoral disinformation online, it is critical that, as an organ of the state, it does not overstep boundaries that have been delineated when protecting political forms of expression and open debate in the run-up to elections. In particular, the commission must maintain its impartiality in the period immediately before elections and referendums. In *McKenna v An Taoiseach*,³¹ it was pointed out that the organs of the government must take care to ensure impartiality and equality when issuing advice and information to the public with respect to electoral campaigns specifically if the 'public purse' is implicated in such advocacy.³² As clarified in the subsequent High Court case of *McCrystal v Minister for Children*,³³ limitations on state interference through disseminating information to voters vis-à-vis the *McKenna* judgment exist in the interests of 'fully informing the electorate in advance' of elections, reiterated by Kearns P as 'vital in any democracy'.³⁴ This is reflective of the rationale used by the ECtHR of ensuring a level playing field for political advertisers and 'preserving the impartiality of broadcasting on public interest matters and, thereby, of protecting the democratic process' as a legitimate aim accepted in *Animal Defenders International v UK*.³⁵ Following Denham CJ in the Supreme Court appeal of the *McCrystal* case, information disseminated with respect to informing the electorate must, at a minimum, be conveyed in a manner that is 'fair, equal, and impartial'.³⁶ Accordingly, the commission's functions must be framed in a manner that is cognisant of well-established limitations surrounding impartiality and political expression. However, this must be considered alongside the role of the commission in fostering pluralistic debate and imparting reliable information to the electorate in good faith. This was considered by Hogan J, who directly addressed the functional scope of the referendum commission in *Doherty v Referendum Commission*,³⁷

30 The Constitution provides in Article 40.6.1. for the right of citizens to express freely their convictions and opinions.

31 *McKenna v An Taoiseach* (No 2) [1995] 2 IR 10.

32 Niall F Buckley, 'Developments in constitutional law' (The Bar Council, 15 July 2013).

33 *McCrystal v Minister of Youth Affairs and Others* [2012] IESC 53.

34 *Ibid.*

35 *Animal Defenders International v UK*, App no 48876/08 (ECHR, 22 April 2013).

36 *McCrystal* (n 33).

37 *Doherty v Referendum Commission* [2012] IEHC 211.

where it was stated that the proliferation of 'extreme, far-fetched and fanciful' claims 'were believed to have had the effect of distorting genuine political debate'. This, as Hogan pointed out, comprised part of 'the background to the establishment of the Commission'. The referendum commission, a body that the new commission will subsume, had been constructed as 'a specialist body' that would 'seek impartially to ascertain the true facts (insofar as they could be ascertained) and to communicate general information to the public'.³⁸

This underlines an important informative function that must continue, and potentially expand, under the prospective new electoral commission. However, in particular when considering if and how the new commission could restrict political forms of expression, the ECtHR has clarified its reluctance to uphold legal proceedings by contracting states that are deemed to present incursions into the freedom of political debate that the court considers intrinsically important in electoral democracy. In *Bowman v UK*,³⁹ it was highlighted that freedom of political debate should be strenuously protected in order for citizens to effectively express their choice in the legislature, and that 'it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely'.⁴⁰ In *Kita v Poland*,⁴¹ the ECtHR reiterated 'the right to impart, in good faith, information on matters of public interest, even where this involved damaging statements about private individuals'.⁴² Forms of political expression that involve criticism of elected officials require the most scrutiny. In *Feldek v Slovakia*,⁴³ the court stressed that 'limits of acceptable criticism are still wider where the target is a politician'. Moreover, in *Brzeziński v Poland*,⁴⁴ the ECtHR noted that the statements were made in the run-up to elections and were of public and political interest, leaving 'little room' for Article 10 interferences. In addition, the court emphasised a wider scope of permissible criticism towards elected officials, further limiting the margin of appreciation for interferences by contracting states, in light of a wider scope of 'admissible exaggeration and provocation' within 'political debate at local level'.⁴⁵ In *Salov v Ukraine*,⁴⁶ the punishment of a five-year sentence along with a fine and licence revocation for the applicant's publication of false information in the run-up to an election was deemed excessive and disproportionate.⁴⁷ These robust protections by the ECtHR must be understood and further probed when fleshing out the role of the new commission if it is mandated to sanction the dissemination of false information in the run up to elections and referendums as an electoral offence under accompanying legislation.

While the commission, as an organ of the state, must take care not to frustrate rights to freedom of expression under Article 40 of the Constitution and Article 10 of the ECHR, the Irish government, and the legislators tasked with finalising the commission, must remain aware that contracting states to the Convention can also have positive obligations in order to secure optimal conditions for freedom of expression. This was highlighted by the ECtHR in *Dink v Turkey*, where it was stated that:

38 Ibid.

39 *Bowman v UK*, 141/1996/760/961 (ECHR 19 February 1998).

40 Ibid.

41 *Kita v Poland*, App no 57659/00 (ECHR 8 July 2008).

42 Ibid.

43 *Feldek v Slovakia*, App no 29032/95 (ECHR 12 July 2001).

44 *Brzeziński v Poland*, App no 47542/07 (ECHR 25 July 2019).

45 Ibid.

46 *Salov v Ukraine*, App no 65518/01 (ECHR 6 September 2005).

47 Ibid.

States had positive obligations in relation to freedom of expression: they must not just refrain from any interference but must sometimes take protective measures even in the sphere of the relations of individuals between themselves. They were also required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear.⁴⁸

Moreover, in *Özgür Gündem v Turkey*,⁴⁹ it was clarified that the ‘genuine, effective exercise of’ freedom of expression under Article 10 is not limited ‘the State’s duty not to interfere, but may require positive measures of protection’.⁵⁰ Accordingly, it is imperative that, if the electoral commission attempts to interfere with freedom of expression when combatting electoral disinformation, the scope of the state’s positive obligations, as well as limitations, under both the ECHR and the Constitution, are sufficiently probed. This is a crucial balance that legislators need to address when the formal construction of the commission finally begins, in particular when mediating freedom of expression protections with countervailing public interests and ‘pressing social’ needs.⁵¹ While it is urgently necessary, it is far from clear if the commission will ultimately have clear responsibilities for combatting electoral disinformation beyond generic information campaigns. If the commission’s functions do in fact go further, the connected regulatory framework must be conscious of constitutional and fundamental rights protections, while not using the reluctance of the judiciary in permitting interferences with political expression as a crutch to shirk responsibility in this critical area of Irish electoral reform.

Conclusion

It is without question that the right to freedom of expression creates limitations that shape the electoral commission’s role in combatting disinformation online. As outlined in both an Irish and European legal context, freedom of expression in the run-up to elections often comes under the privileged purview of political expression. This means that, if the prospective commission is to be tasked with countering disinformation, regulatory scrutiny must avoid being restrictive in nature where possible. This caveat, while important to acknowledge, should not preclude scrutiny of disinformation in the run-up to elections. Regulatory constraints posed by freedom of expression protections do not impede the commission from informing the electorate, providing clarity on pertinent electoral information, and correcting pervasive false claims that could lead to a distortion of the facts. Arbitrary and restrictive measures that abridge the freedom to express opinions must be treated with legal suspicion. As a body entrusted with electoral oversight, the commission must limit its scrutiny to false claims that could affect the outcome of electoral events by distorting and polluting the information needed for voters to make informed choices. Going forward, the development of the commission must further probe how more proactive and robust mechanisms to counter false claims can be established, in a manner that complements other areas of urgently required reform in the area of digital political advertising. At a minimum, the commission needs to be capable of delivering reliable and data-driven information to voters, in a capacity that can dispel and debunk claims that arise and gain traction on foot of pervasive disinformation campaigns in the run-up to Irish elections. The manner and form in which this occurs must be of primary concern when the commission finally comes to fruition in the coming months.

48 *Dink v Turkey*, App no 2668/07 (ECHR 14 September 2010).

49 *Özgür Gündem v Turkey*, App no 23144/93 (ECHR 16 March 2000).

50 *Ibid.*

51 *Sunday Times v UK*, App no 6538/74 (ECHR 26 April 1979).

