

# THE ABCs OF THE VOTING SYSTEM IN IRELAND

Ireland's system of listing candidates on ballot papers in alphabetical order is manifestly unfair and leads to perceived electoral discrimination, writes Anthony Moore, a Fianna Fáil candidate in the 2019 Local Elections. The Barrister who practises on the Dublin and Eastern Circuits argues that it's time for a ballot paper for the 21st century.

**O**n 24 May, voters will go to the polls in local and European Parliament elections and will be asked to vote for their preferred candidates, all neatly arranged before them in alphabetical order on the ballot paper, according to their surnames.

Under relevant legislation, the names of candidates on ballot papers for elections to the presidency, Dáil Éireann, local authorities, and the European Parliament must all be arranged alphabetically in order of their surnames.

This practice came before the High Court in 1986 in the case of *O'Reilly v Minister for the Environment* ([1986] IR 143) in the context of local elections. The plaintiff there wished to contest forthcoming local and Dáil elections and sought a declaration that the arrangement was repugnant to article 40 of the Constitution in failing to provide fairness of procedures, or to hold him equal before the law.

During the trial, the plaintiff abandoned reliance on his right to equality before the law, because the then applicable case law showed that the right asserted had to derive from the rights of citizens as human beings – an application of the so-called 'human personality' doctrine.

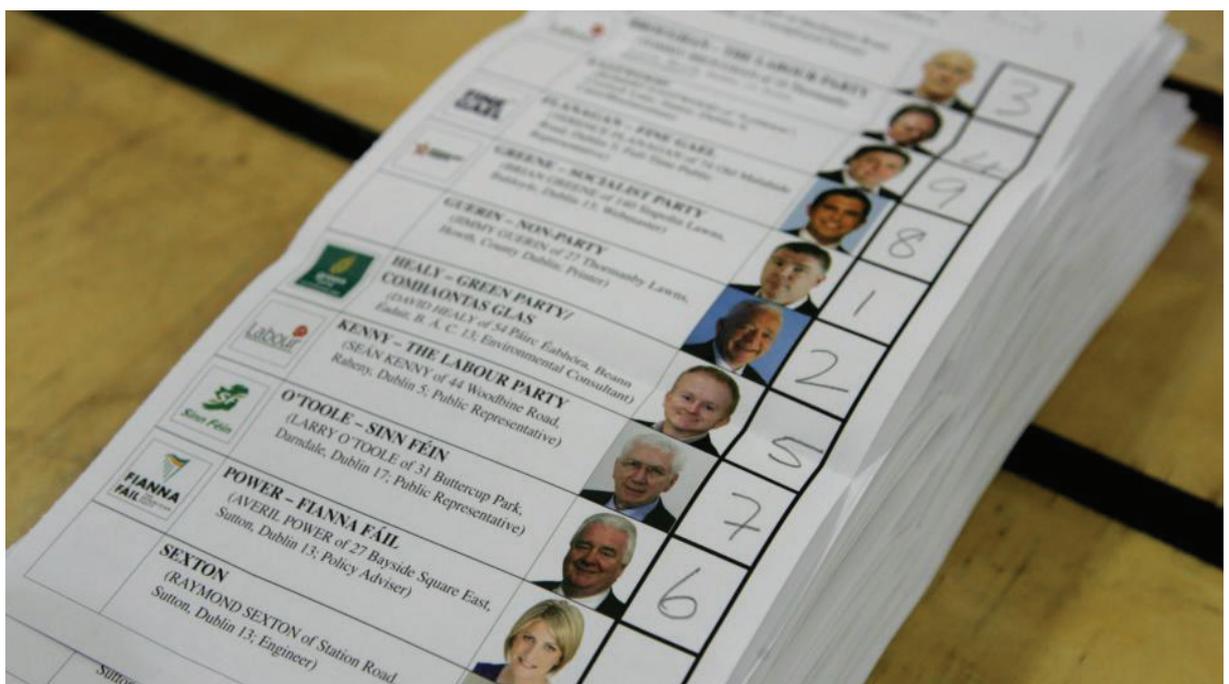
nearly 40 years, there has been a significant over-representation of candidates whose surnames begin with letters at the commencement of the alphabet. The word 'significant' was used by the expert witnesses to indicate a degree of deviation, which was not necessarily large, but of such a magnitude that it could not be explained by chance."

However, he was not persuaded that the system was unreasonable or unconstitutional, saying: "The established propensity of the electorate in favour of candidates whose names appear towards the top of the ballot paper is not, as I see it, so much a defect in the present electoral system, but rather it is a measure of some degree of indifference by the electorate or some part of it as to how their votes – and in particular their second and subsequent preference votes – are cast."

He continued: "It would seem, therefore, that what is described as a bias in favour of the candidates whose names appear at the top of the ballot is not so much a defect in the system itself, as a defect or a want of care or a want of interest by the electorate ... I am left with the belief that the alphabetical system of listing candidates as provided for under the [relevant

## DEGREE OF INDIFFERENCE

In dealing with his remaining argument, Murphy J accepted that the legislation disadvantaged candidates by reference to their surnames, saying: "I am satisfied that the evidence adduced proves conclusively that, in Dáil Éireann elections over a period of



legislation] constitutes a reasonable regulation of elections to Dáil Éireann. It was not argued that any different considerations applied in relation to elections to local authorities.”

### TIME FOR RECONSIDERATION?

Over 30 years have passed since O’Reilly, and the decision seems ripe for reappraisal on a number of grounds. First, it is questionable whether the ‘human personality’ doctrine as it is presently constituted would preclude reliance on article 40.1 of the Constitution.

The right to stand for election or participate in the political life of one’s country is well-recognised in key human rights instruments (articles 21 and 25 of the 1948 Universal Declaration of Human Rights and article 25 of the 1966 International Covenant on Civil and Political Rights). The European Court of Human Rights has also held that the right to stand for election is “inherent in the concept of a truly democratic regime” (Podkolzina v Latvia (2002); application no 46726/99).

The right could, therefore, be said to form part of the human personality as to enable an attack to be mounted on the compatibility with article 40.1 of provisions requiring alphabetical ordering of candidates’ names.

In that regard, it may be noted that, in 2017, in *NHV v Minister for Justice*, the Supreme Court relied in part upon international legal commentary to conclude that the ‘right to work’ formed part of the human personality. In 2018, the High Court held that the process of grading the Leaving Certificate went to the fundamentals of human personality (*Carter v Minister for Education*).

Secondly, the characterisation of the discrimination likely to be suffered by the plaintiff in O’Reilly as being due to the essential indifference of the voters does not sit easily with the modern appreciation of the harm done to individuals who are indirectly discriminated against as a result of an ostensibly neutral provision, criterion, or practice.

Thirdly, the provisions providing for the current alphabetical listing of names could also fall foul of article 14 of the European Convention on Human Rights, which prohibits discrimination, and become the subject of an application for a declaration of incompatibility with the convention under the ECHR Act 2003.

### IMPLEMENTING EU LAW

The rationale in O’Reilly could also be impugned before the Court of Justice of the European Union (CJEU) on anti-discrimination grounds via a reference for a preliminary ruling under article 269 of the Treaty on the Functioning of the



**The present system can be replaced with a fairer one. Last year, city councillors in Vancouver voted to scrap the alphabetical listing of candidates for municipal elections and replace it with a randomised ballot paper.**

### ABOUT THE AUTHOR

Anthony Moore is a practising barrister, specialising in constitutional and European law and administrative law and judicial review. He holds degrees in Law and German from Trinity College, Dublin, a Masters in Law from Cambridge University, as well as the degree of barrister-at-law from King’s Inns, from which he also holds an

Advanced Diploma in Planning and Local Government Law. He has represented clients, including various State bodies, in the Superior Courts in Ireland and in the Court of Justice of the European Union in Luxembourg.



European Union.

Elections to the European Parliament are governed by the European Parliament Elections Act 1997, as amended. The act gives effect to Council Directive 93/109/EC, as amended, which lays down the arrangements for member state nationals to vote and stand as candidates to the European Parliament in their host member state. In giving effect to the directive, the Oireachtas is implementing EU law, which means that the provisions of the EU's Charter of Fundamental Rights apply to it.

In this regard, article 20 of the charter provides that “everyone is equal before the law”, and article 21.1 goes on to prohibit discrimination on a non-exhaustive list of grounds. Article 21.2 also prohibits discrimination on the grounds of nationality.

In C-68/17 IR (2018), a case concerning alleged discrimination on the basis of religion, the CJEU made clear that plaintiffs may rely on article 21 of the charter in disputes concerning EU law and that, if necessary, a national court must disapply national law that is inconsistent with it.

It said: “The prohibition of all discrimination on grounds of religion or belief, now enshrined in article 21 of the charter, is therefore a mandatory general principle of EU law and is sufficient, in itself, to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law.

“Accordingly, in the main proceedings, if [a national court] considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, [it] must disapply that provision.”

Article 52 of the charter provides that any limitation on the exercise of rights recognised by it has to be provided for by law. Proportionality considerations are relevant: “[limitations] may be made only if they are necessary and genuinely meet objectives of general interest recognised by the union or the need to protect the rights and freedoms of others”.

### A MORE DIVERSE IRELAND

In the EU context, it is difficult to see how the discrimination caused by the 1997 act's requirements concerning the ordering of names on European Parliament election ballot papers can comply with the charter, as a simple example shows.

According to the 2016 census, there were 122,515 Polish nationals in Ireland. The top ten most common surnames in Poland begin with the letters K, L, N, S, W and Z. On the



assumption that that is replicated among the Polish community living in Ireland, a Polish national standing as a candidate here in the European elections, and bearing a surname beginning with any of those letters, may be placed at a disadvantage as a result of not being near the top of the ballot paper, and would have a reasonable basis for contending that the 1997 act constituted discrimination in breach of the articles 21.1 and 21.2 of the charter.

### PROPOSALS FOR REFORM

The present system can be replaced with a fairer one. Last year, city councillors in Vancouver voted to scrap the alphabetical listing of candidates for municipal elections and replace it with a randomised ballot paper.

This followed a motion by a councillor who said that the alphabetical listing was biased against candidates whose surnames were Chinese, South Asian and Latino, among others – a bias more pronounced the longer candidate lists were. It was noteworthy that, of Vancouver's ten city councillors holding office at that time, six had surnames beginning with the letters A to D.

As the High Court accepted in O'Reilly, Ireland's current system of ordering candidates on ballot papers in alphabetical order is manifestly unfair to candidates whose surnames begin with the letters H to Z. It must now be abolished.

Perceived electoral indifference to this unfairness is no reason for maintaining it, particularly in a changing, more diverse Ireland, and given the very clear non-discrimination requirements of EU law. It is now time for a ballot paper for the 21st century.

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